PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE

(INCORPORATING REVISIONS IN RESPONSE TO PUBLIC COMMENTS RECEIVED)

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FINAL SUBMISSION AND REPORT TO THE SUPREME JUDICIAL COURT BY THE S.J.C. STANDING ADVISORY COMMITTEE ON THE CRIMINAL RULES

May 9, 2003

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The Standing Advisory Committee on the Rules of Criminal Procedure

Hon. Charles Hely, *Chair* (2003 - present); Hon. Daniel F. Toomey, *Chair* (1995 - 2002);

Currently Active Committee Members: Liilian C. Andruszkiewicz; Hon. Jay D. Blitzman; Hon. Phillis J. Broker' James J. Foley, Jr.; Andrew Good; Daniel J. Hogan; Pamela L. Hunt; Hon. Diane M. Kottmyer; William J. Leahy; Arthur B. Leavens; Hon. Robert F. Murray; Carmen W. Picknally; Hon. Howard J. Whitehead; Gary D. Wilson; Enoch O. Woodhouse, II; Lena M. Wong.

Robert Bloom, *Liason with the Supreme Judicial Court Rules Committee*

Eric Blumenson, *Reporter*

David Rossman, *Deputy Reporter*

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Contents

Each rule is presented in the following order:

1. Summary and explanation of revisions.

2. Where applicable, a summary of major suggestions received during the public comment period, and dissents in the Minority Reports; and the Committee's responses.

3. The proposed rule.

4. The proposed rule, marked up to show all deletions and additions to the existing rule so as to permit a comparison between them.

Introduction

In 1995, the Supreme Judicial Court asked its Standing Advisory Committee on the Criminal Rules to undertake a review the Rules of Criminal Procedure, the first full-scale review to take place since the Rules were promulgated in 1978. The Committee and its Reporters have completed the first of two phases in this review process.

The first phase involved identifying those rules that require more immediate attention because of changes to the law resulting from legislation or judicial decision. The Committee considered these rules and others that are integrally related to them, agreed on revisions or additions that it believed were necessary or advisable, and submitted its proposals to the Supreme Judicial Court in a Submission dated Oct. 26, 1999. (Because many of those rules build on each other, the Committee deferred submission until all such interlocking rules were completed.) The Supreme Judicial Court then released and published the proposed rules for public examination and comment. The Committee received and thoroughly reviewed comments submitted by prosecutors, defense attorneys, government agencies and others, and revised some of its proposals in light of several meritorious suggestions. This submission contains the fruit of deliberations that have been conducted over the past eight years. The proposals herein would revise rules: 1, 3, 5, 7, 11, 12, 13, 14 and 34, and add a new rule numbered 3.1.

Phase two will consider the remaining Rules of Criminal Procedure, which in the Committee's judgment require fewer and less urgent revisions.

The Committee has previously submitted changes to a small number of rules that either required immediate action or were so independent of the rest of the project that they could be considered separately. These revisions, which were subsequently promulgated by the Court, affected Rules 10 (continuances), 15 (interlocutory appeals), 30 (new trial) and 36 (case management). The Committee has also previously submitted proposals concerning the integration of S.J.C. Rule 3:08 (the defense function and the prosecutor function) into Rule 3:07.

Respectfully submitted,

Charles Hely, Chair

Standing Advisory Committee on
the Rules of Criminal Procedure

May 9, 2003

cc.: *The Standing Advisory Committee on the Rules of Criminal Procedure*

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RULE 1 -- TITLE; SCOPE

Summary and Explanation of Revisions

This revision adopts a suggestion conveyed to the committee during the public comment period. The comments submitted by Chief Justice Grace and by Judge Blitzman, both of the Juvenile Court Department, noted that although existing Rule 1(b) states that the criminal rules govern delinquency proceedings in district and superior Courts, it does not list delinquency proceedings in the Juvenile Court Department. The memorandum suggests that the rules for juvenile court be consistent with, and governed by, the same rules as delinquency (and criminal) proceedings in the other trial courts. This accords with M.G.L. c. 218, sec. 59, which provides that "Except as otherwise provided by law, the divisions of the juvenile court department shall have and exercise, within their respective jurisdictions, the same powers, duties, and procedure as the divisions of the district court department; and all laws relating to district courts or municipal courts in their respective counties or officials thereof or proceedings therein, shall, so far as applicable, apply to said divisions of the juvenile court department…"

The Committee voted to include "delinquency and youthful offender proceedings in the Juvenile Court" in its Proposed Rule 1(b).

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PROPOSED RULE 1

RULE 1. TITLE; SCOPE

(a) Title. These rules may be known and cited as the Massachusetts Rules of Criminal Procedure. (Mass.R.Crim.P.)

(b) Scope. These rules govern the procedure in all criminal proceedings in the District Court, in all criminal proceedings in the Superior Court, in all delinquency and youthful offender proceedings in the Juvenile Court, District Court and Superior Court consistent with the General Laws, and in proceedings for post-conviction relief.

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PROPOSED RULE 1 – SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

RULE 1. TITLE; SCOPE

~~(Applicable to District Court and Superior Court)~~

(a) Title. These rules may be known and cited as the Massachusetts Rules of Criminal Procedure. (Mass.R.Crim.P.)

(b) Scope. These rules govern the procedure in all criminal proceedings in the District Court, in all criminal proceedings in the Superior Court, in all delinquency proceedings in the **Juvenile Court,** District Court and Superior Court consistent with the General Laws, and in proceedings for post-conviction relief.

RULE 3 -- COMPLAINT AND INDICTMENT; WAIVER OF INDICTMENT; PROBABLE CAUSE HEARING

Summary and Explanation of Revisions

There are three major changes effected in this new rule. First, it eliminates the provisions that force the defendant to choose between a probable cause hearing and an indictment. This procedure was never used in practice and is of doubtful constitutional validity. Whatever benefits it was intended to provide can be gained by the prosecutor's obtaining a direct indictment.

Second, the revised rule adds a provision describing the right to a probable cause hearing, the effect of an indictment on that right, and the consequence of a finding of probable cause and of a finding that probable cause has not been established.

Third, it adds a provision describing the complaint process, making clear that the complainant need not have first hand knowledge of the facts on which the complaint is based. This provision also makes two substantive changes in the existing practice. The first of these requires a probable cause determination for all complaints, not just for those where process will issue. This revision will affect only those defendants who have been arrested prior to the application for a complaint. The second of the substantive changes in the complaint procedure is a requirement that the information on which probable cause is based be preserved in some form, either in writing or recorded orally.

The Committee considered and rejected a proposal to add language describing the procedure at a probable cause hearing.

3(a)

The Committee amended this subsection by eliminating the language that forced the defendant to waive an indictment in order to retain the right to a probable cause hearing. The Reporter's Notes to the original 1979 version of Rule 3 made clear that the intent of the drafters was to force all noncapital defendants in the District Court who had a right to an indictment to make an election between having their cases considered by a grand jury or obtaining a probable cause hearing. In eliminating the possibility of a defendant having both a probable cause hearing and an indictment, the original Rule made a significant change in prior practice.

Despite the clear intent of the original Rule, the waiver provision was never put into operation. One reason for this was the fact that the Rule originally implemented the waiver requirement by conditioning the waiver on a defendant's request for a probable cause hearing. However, nothing in the Rule or in the statutes governing probable cause hearings required defendants to request such a hearing. Another reason for the disuse of the waiver requirement was two doubts about its constitutionality. First, it would impose a cost (loss of a probable cause hearing) on the exercise of a defendant's constitutional right to an indictment. Second, holding a defendant without a probable cause hearing might raise a due process problem.

In addition to these concerns, the Committee felt that it was not necessary to force a choice on a defendant to eliminate the inefficiency associated with providing both a probable cause hearing and an indictment. The prosecutor can prevent this duplication simply by indicting the defendant prior to the probable cause hearing.

This subsection was also amended by eliminating the reference to criminal proceedings against juveniles. This change was necessary because the 1996 legislation restructuring the juvenile process made it obsolete.

3(c)(1)

The Committee voted to delete the original language of subsection 3(c)(1) because with the abolition of the forced waiver provision, it became unnecessary. Under the amended rule, there is no need for a judge to advise a defendant that he or she has the right to waive indictment. New subsection 3(c)(2) deals with the procedure to waive indictment. As to the right to counsel which was mentioned in the original language of subsection 3(c)(1), the Reporter's Notes will make clear that the waiver of indictment is a critical stage at which defendants have the right to counsel.

The new version of subsection 3(c)(1) was previously numbered subsection 3(b)(2). The only change was to delete the language referring to probable cause hearings. It was deleted as unnecessary in light of the abolition of the forced waiver provision. New subsection 3(f) provides for probable cause hearings for defendants who have the right to an indictment, and the Reporter's Notes will make clear that this applies even in the case of a defendant who has waived the right to an indictment.

3(c)(2)

This provision deals with the topic formerly addressed in the original subsections 3(c)(1) and 3(d), which have been deleted. It makes clear that a defendant may waive an indictment. It establishes that the court in which the waiver takes place depends on the timing of the District Court's decision to bind the case over. Prior to that event, waivers take place in the District Court. After that event, they take place in Superior Court but require the consent of the prosecutor.

3(d)

The topic of the original subsection 3(d) has been moved to new subsection 3(c)(2). What is now subsection 3(d) was formerly the original language of subsection 3(c)(2). It remains unchanged except for renumbering.

3(e)

This subsection remains the same except for the deletion of language made unnecessary by the elimination of the forced waiver requirement.

3(f)

This subsection details when a probable cause hearing must be held and the consequence of a finding of no probable cause. It basically restates existing law, by describing: the right to a probable cause hearing for all District Court defendants whose trials will be held in Superior Court; the exception to the right to a probable cause hearing in those cases where the Commonwealth indicts the defendant for the same crime as alleged in the complaint; and the consequence of finding probable cause and of finding no probable cause.

3(g)(1)

Subsection 3(g) deals with the process by which complaints come into being. The Committee felt that the Rules should describe the process by which one obtains a complaint.

Subsection 3(g)(1) requires that the facts constituting the basis for the complaint be preserved in some form. This change substantially accords with the practice now required by the new District/Municipal Courts Rules of Criminal Procedure. Rule 2 of those rules requires a written statement prior to the issuance of a criminal complaint, either in the form of a police report or a statement on an application for a complaint. Subsection 3(g)(1) gives the magistrate the discretion to allow the complainant to give an oral statement, provided that the statement is recorded or otherwise memorialized. The Reporter's Notes will make clear that the complaint can be based on any combination of: a written statement submitted by the complainant; the complainant's recorded oral statement; or a written statement made by a magistrate based on information conveyed by the complainant. The Reporter's Notes will also clarify that in misdemeanor cases where there is a magistrate's hearing under c. 218 § 35A, the hearing itself need not be recorded so long as there is a written statement setting forth the basis for the magistrate's conclusion that probable cause exists to authorize the complaint.

3(g)(2)

This subsection requires a probable cause determination for all complaints. In order to understand its impact, it is helpful to separate defendants against whom complaints are sought into three categories:

(i) Defendants who have not been arrested prior to the complaint.

(ii) Defendants who have been arrested, and are held in custody longer than twenty-four hours only the basis of the arrest.

(iii) Defendants who have been arrested, and have either been arraigned prior to the expiration of twenty-four hours, released prior to the complaint, or for whom a warrant or process in another case authorizes their detention.

Those in the first category receive a probable cause determination as part of the existing complaint process. Those in the second category also receive a probable cause determination, as a result of the *Jenkins* decision, which requires a probable cause determination within twenty-four hours for all persons under arrest held in custody on the

basis of the arrest alone. Under current law, then, only those in the third category get no probable cause determination before having to face a criminal complaint.

The proposed rule requires that a probable cause determination be made for every case in which a complaint is sought. Thus, the only class of defendants whom the proposed rule will affect is those in the third category. As to these people, it is sound policy to require a determination of probable cause before a complaint is authorized. For most of them, the criminal case they will face will be within the jurisdiction of the District Court. There is no judicial screening mechanism for District Court trial cases. If a case is so weak that it begins without probable cause, the defendant may have to suffer through the entire process up to a trial. In addition, it is possible that a defendant in this third category may end up being held in custody on the complaint, for example if the conditions of bail are changed or if the unrelated warrant is cleared up. Under existing law, these defendants will have never received the probable cause determination required by *Jenkins*. Making probable cause a requirement for all complaints will solve this problem. The probable cause determination in the complaint process is relatively easy to make. District Court staff make it for the majority of cases where a complaint is sought. The Committee concluded that adding the requirement contemplated by the proposed rule is unlikely to create a burden on the clerical staff of the District Courts.

The Federal Rules of Criminal Procedure require that all complaints be based on a showing of probable cause, both in cases where the complaint is accompanied by a warrant or summons as well as where the complaint is sought after a person has been arrested without a warrant. Some other states also require a showing of probable cause for a complaint sought after a warrantless arrest.

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Major issues raised in public comments and 2003 minority report, and Committee responses

Issuance of Complaints — In response to comments on the original proposed Rule, the Committee considered at length the requirement that the basis for a complaint be in writing or recorded. The Committee was closely divided on whether to require some form of memorialization of the basis for a complaint in all cases, or only in cases where there was a hearing under c. 218 § 35A, the exact same context as in Commonwealth v. DiBennadetto, 436 Mass. 310 (2002) which held that "the issuance of a complaint by a clerk-magistrate is not to be revisited by a further show cause hearing; the defendant's remedy is a motion to dismiss the complaint." *Id.* at 313.

The most recent Minority Report (submitted in April, 2003)[1] **objects** to the Committee's postion on the ground that requiring a written basis for all complaints would necessarily extend the scope of the *DiBennadetto* decision. The Committee believes that while the existence of a record of the basis for a complaint will facilitate the sort of

[1] Committee member Pamela Hunt received leave from the most recent Committee meeting to submit a minority report on this rule (hereinafter "2003 Minority Report"), and the Reporters were directed to include a response to it in this submission.

review that a motion to dismiss requires, the existence *vel non* of such a record does not necessarily require such review. In any event, the Reporter's Notes to Rule 3 will make clear that the question of review is a matter that the Rules do not address.

Many members of the majority of the Committee on this issue believe that the logic of *DiBennadetto* requires that defendants facing felony charges in District Court in cases where there has been no arrest also have a right to move to dismiss the complaint on the ground that there was no probable cause for it to have issued initially. Although in such cases there is no right to a show cause hearing, current law requires probable cause for the complaint to issue just as it does in misdemeanor cases where there has been a hearing. This issue has not yet been addressed by either this Court or the Appeals Court. However, whatever the eventual resolution of the future scope of *DiBennadetto*, the Committee continues to believe that requiring a written or recorded record of the basis for a complaint will protect the integrity of the process.

The Committee's original proposal on this issue arose prior to *DiBennadetto*, which first recognized a right to review whether the factual submission to a magistrate met the standard of probable cause required for a complaint. Consequently, the issue of facilitating the resolution of a motion to dismiss a complaint in District Court for lack of probable cause was not part of the Committee's rationale for its recommendation. The original proposal was modeled on the rules of other jurisdictions. *See* Fed. R. Crim. Pro. Rule 4 (warrant shall issue only if probable cause appears from complaint or from affidavits); R.I. Rules Crim. Pro., Rule 3 (" . . . the judge or other officer shall examine under oath the complainant and any witnesses the defendant may produce, and shall require their statements be reduced to writing and be subscribed and sworn to by the persons making them."); Colo. R. Crim. Pro., Rule 4(a) (warrant shall not issue on complaint unless probable cause appears in written or recorded statements); Minn. Rules Crim. Pro., Rule 2.01 (facts establishing probable cause shall be either set forth in writing or in recorded testimony). The Committee continues to believe that the approach of these other court systems represents sound judicial policy.

Probable Cause Hearing and the Right to Indictment—The 2003 Minority Report also objects that amendments to Rules 3 and 7 dealing with probable cause hearings would interfere with the prosecutor's ability to obtain direct indictments of cases pending in the District Court. The Committee believes that its proposals will not hamper the ability of prosecutors to obtain direct indictments in a reasonable manner, do not change existing law or practice on this issue, and are necessary to ensure efficient processing of District Court cases bound for Superior Court.

The Committee's recommendations with respect to the treatment of cases in the District Court that will eventually be resolved in Superior Court were based on three premises. First, the Committee believes that it is sound policy for the administration of justice in the District Court to require these cases to proceed to a timely probable cause hearing if an indictment has not yet returned. Any other course would leave these cases in limbo, depriving District Court judges of the ability to ensure that they progress to an appropriate resolution. Second, the Committee expects that District Court judges will continue to exercise appropriate discretion in granting continuances to prosecutors in

cases scheduled for a probable cause hearing where an indictment is imminent. And third, the Committee's understanding of the statutory mandate contained in GL c 276, § 38 supports its view that defendants in these cases have a right to a timely probable cause hearing unless and until they are indicted.

The Committee believes it is important that every time a case appears on the docket in either District Court or Superior Court, the event is a meaningful step toward the successful resolution of the matter. Toward this end, it has advised amending Rules 3 and 7 to ensure that cases in the District Court that will eventually be resolved in the Superior Court proceed in a timely fashion toward one of the two means by which the case can arrive in the latter forum. The timing of one of these two means, a direct indictment, is under the control of the prosecutor. The other mechanism is for the District Court to hold a probable cause hearing and bind the defendant over to the Superior Court for action by the grand jury. The language the Committee used in its suggested revision of Rule 3(f), talking about a defendant's "right to a probable cause hearing," and in Rule 7(e), requiring the District Court to "schedule the case for a probable cause hearing," were both designed to give District Court judges the power to ensure that cases bound for Superior Court do not languish on their dockets. The Committee rejected the position the minority report advocates because it felt it unwise to strip District Court judges of the power to require prosecutors to move in a timely fashion toward one of the two events that operate as a gateway to the eventual resolution of the case.

The Committee was aware of the time pressures that some prosecutors may face in obtaining a direct indictment. The Committee expects that District Court judges under the revised Rules, as under the current regime, will continue to be reasonable in entertaining requests for more time from prosecutors who intend to obtain an indictment. Indeed, the Reporter's Notes for the revised Rules will still contain an admonition of the sort that exists in the current Notes to Rule 3(e):

> The policy underlying this subdivision looks to liberal granting of continuances to the prosecution in order that indictments may be sought . . .

The Committee's view that prosecutors do not have unfettered freedom to postpone the date of a probable cause hearing is also based on its view of current law. The mandate of GL c 276, § 38 provides the statutory basis for the timely provision of a probable cause hearing:

> The court or justice before whom a person is taken upon a charge of crime shall, *as soon as may be,* examine on oath the complainant and the witnesses for the prosecution . . . [emphasis added]

Case law that predated the Rules of Criminal Procedure recognized that this provision created a *right* to a probable cause hearing for defendants charged with offenses that would be disposed of in Superior Court who had not yet been indicted. *See* Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 52 (1974) ("Where the original charge is in the form of a complaint and the defendant is under arrest not having

been indicted by a grand jury, he is *entitled* "as soon as may be" to a determination whether there is probable cause to hold him for trial. G. L. c. 276, § 38." [emphasis added]); Corey v. Commonwealth, 364 Mass. 137, 143 (1973) ("Since the petitioner was deprived of his *statutory right to a probable cause hearing* before being bound over for trial, unless the court decides to exercise its jurisdiction, he must be given a new preliminary hearing to determine whether there is sufficient evidence to justify holding him for trial." [emphasis added]).

When the existing version of Rule 3 was adopted in 1979, it reflected this view. Rule 3(b)(2) states:

> *A defendant charged in a District Court with an offense as to which he has the right to be proceeded against by indictment shall have the right*, except when the offense charged is a capital crime*, to waive indictment, whereupon a probable cause hearing shall be held* in District Court unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule. [emphasis added]

The language in the Reporter's Notes to this section also speak in terms of the defendant's entitlement to a probable cause hearing:

> the non-capital defendant who waives indictment is *entitled* to a probable cause hearing in District Court [emphasis added]

Precepts of sound judicial administration, faith that District Court judges will continue to exercise discretion in administering the Rules in the face of reasonable requests by prosecutors for continuances, and an understanding of the requirements of existing law all lead the Committee to adhere to its recommendations in the face of the minority report's objections to its treatment of this issue.

**

PROPOSED RULE 3

Rule 3. COMPLAINT AND INDICTMENT; WAIVER OF INDICTMENT; PROBABLE CAUSE HEARING

(a) Commencement of Criminal Proceeding. A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which the defendant has the right to be proceeded against by indictment and the defendant has waived the right to an indictment pursuant to subdivision (c), the Commonwealth may proceed in the Superior Court upon the complaint.

(b) Right to Indictment. A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the District and Superior Courts and the District Court retains jurisdiction.

(c) Waiver of Indictment.

> (1) Right to Waive Indictment. A defendant charged in a District Court with an offense as to which the defendant has the right to be proceeded against by indictment shall have the right, except when the offense charged is a capital crime, to waive indictment, unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.
>
> (2) Procedure for Waiving Indictment. The defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right in the District Court prior to the determination to bind the case over to the Superior Court for trial. The District Court may for cause shown grant relief from that waiver. After the determination by the District Court to bind the case over to the Superior Court for trial, the defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right, with the consent of the prosecutor, in the Superior Court.

(d) Transmission of Papers. If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

(e) Indictment after Waiver. Notwithstanding the defendant's waiver of the right to be proceeded against by indictment, the prosecuting attorney may proceed by indictment.

(f) Probable Cause Hearing. Defendants charged in a District Court with an offense as to which they have the right to be proceeded against by indictment and defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense. If the District Court finds that there is probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the Court shall bind the defendant over to the Superior Court. If the District Court finds that there is no probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the Court shall dismiss the complaint.

(g) The complaint process

(1) Procedure for Obtaining a Complaint. Any person having knowledge, whether first hand or not, of the facts constituting the offense for which the complaint is sought may be a complainant. The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded. The complainant shall sign the complaint under oath, before a judge or magistrate.

(2) Probable Cause Requirement. The magistrate shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense.

**

PROPOSED RULE 3 – SHOWING REVISIONS AND DELETIONS

KEY TO REPORTER'S CONVENTIONS

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Bold = addition to rule

Rule 3. COMPLAINT AND INDICTMENT; WAIVER OF INDICTMENT**;**
PROBABLE CAUSE HEARING

~~(Applicable to District Court and Superior Court)~~

(a) Commencement of Criminal Proceeding. A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which ~~he~~ **the defendant** has the right to be proceeded against by indictment ~~and requests a probable cause hearing, that request shall constitute a waiver of the right to be proceeded against by indictment and~~ **and the defendant has waived the right to an indictment pursuant to subdivision (c),** the Commonwealth may proceed in **the Superior Court** upon the complaint.

~~No criminal proceeding shall be commenced against a juvenile unless proceedings against him as a delinquent child have been begun and dismissed as required by the General Laws.~~

(b) **Right to** Indictment.

~~(1) Right to Indictment.~~ A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the District and Superior Courts and the District Court retains jurisdiction.

~~(2)~~ **(c)** Waiver of Indictment.

(1) Right to Waive Indictment. A defendant charged in a District Court with an offense as to which ~~he~~ **the defendant** has the right to be proceeded against by indictment shall have the right, except when the offense charged is a capital crime, to waive indictment, ~~whereupon a probable cause hearing shall be held in District Court~~ unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.

(2) Procedure for Waiving Indictment. The defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right in the District Court prior to the determination to bind the case over to the Superior Court for trial. The District Court may for cause shown grant relief from that waiver. After the determination by the District Court to bind the case over to the Superior Court for trial, the defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right, with the consent of the prosecutor, in the Superior Court.

~~(c) Procedure Upon Waiver of Indictment in District Court.~~

~~(1) In General. If the District Court declines jurisdiction over an offense within its concurrent jurisdiction as to which there is a right to be proceeded against by indictment, or if a defendant is arraigned upon a charge over which the District Court has no jurisdiction, the judge shall advise the defendant that he may waive indictment and proceed upon the complaint. No defendant shall waive the right to be proceeded against by indictment unless he is represented by counsel or has waived counsel. A defendant shall not waive the right to be proceeded against by indictment and elect a probable cause hearing except by filing in court, on the return day or at such other time as the court may order, a written waiver of that right and a request for a probable cause hearing. The court may for cause shown grant relief from that waiver.~~

~~(2)~~ **(d)**Transmission of Papers. If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

~~(d) Waiver of Indictment in Superior Court. *Notwithstanding the failure of a defendant to file a written waiver of the right to be proceeded against by indictment* and request for a probable cause hearing in the District Court, *the defendant may with the consent of the prosecuting attorney waive that right and elect to proceed upon the complaint in the Superior Court. The waiver shall be in writing and filed in the Superior Court.*~~

(e) Indictment after Waiver. Notwithstanding the defendant's waiver of the right to be proceeded against by indictment ~~and request for a probable cause hearing~~, the prosecuting attorney may proceed by indictment.

(f) Probable Cause Hearing. Defendants charged in a District Court with an offense as to which they have the right to be proceeded against by indictment and defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense. If the District Court finds that there is probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the Court shall bind the defendant over to the Superior Court. If the District Court finds that there is no probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the Court shall dismiss the complaint.

(g) The complaint process

(1) Procedure for Obtaining a Complaint. Any person having knowledge, whether first hand or not, of the facts constituting the offense for which the complaint is sought may be a complainant. The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded. The complainant shall sign the complaint under oath, before a judge or magistrate.

(2) Probable Cause Requirement. The magistrate shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense.

NEW RULE 3.1 -- DETERMINATION OF PROBABLE CAUSE FOR DETENTION

Summary and Explanation of Revisions

Proposed new Rule 3.1 deals with the topic of obtaining a judicial determination of probable cause for persons held in custody after an arrest. It implements the requirements described by the Supreme Judicial Court in Jenkins v. Chief Justice of the District Court Department, 415 Mass. 221 (1993). It is based on the procedure enacted by Trial Court Rule XI. If this rule is adopted, Trial Court Rule XI should be amended to eliminate duplicative language. The text of Trial Court Rule XI appears following the text of new Rule 3.1.

The Committee felt that the Rules of Criminal Procedure should include this topic and not leave it to the Trial Court Rules. Since this issue is one that cuts across all criminal cases and plays an integral part of pre-trial procedure, the Committee believed that the Rules of Criminal Procedure should address it in order to present a comprehensive picture of the criminal process.

Rule 3.1 has taken the essential elements of the procedure described in Trial Court Rule XI. The only major substantive change that Rule 3.1 makes in the procedure dictated by Trial Court Rule XI is in the standard that the magistrate should use in determining if the custody of the individual is lawful. Trial Court Rule XI directs the "judicial officer [to determine whether] . . . there is probable cause to believe that such arrestee committed one or more of the offenses for which he or she was arrested." Rule 3.1 directs the judicial officer to determine if "there is probable cause to believe the person arrested committed an offense." The Committee believes that the language of Rule 3.1 more accurately focuses on the appropriate issue that is crucial to the question of the legality of an individual's detention prior to being brought to court.

3.1(a)

This provision describes the circumstances under which the police must obtain a determination of probable cause for detention. It essentially restates the categories contained in Trial Court Rule XI(b) with one major exception. Since new Rule 3(g) requires that a determination of probable cause be a prerequisite for the issuance of all complaints, Rule 3.1(a)(ii) excludes those cases from the situations where the police must obtain a determination of probable cause for detention.

The definition section of subsection (a) of the Trial Court Rule was omitted, as unnecessary. The commentary to Rule 3.1 will make clear any needed definitions, in particular defining a magistrate as any person not a judge who is authorized to issue warrants.

3.1(b)

This subsection describes the procedure at a determination of probable cause for detention. It includes most of the details contained in Trial Court Rule XI(d), with two

exceptions. In describing the determination of probable cause for detention, the subsection omits as unnecessary the Trial Court Rule's language stating the proceeding is "non-adversary and informal." The subsection also omits the language in the Trial Court's Rule dealing with the civil liability of judges and magistrates making the determination of probable cause for detention. It is of doubtful value for Rules of Criminal Procedure to try to establish policy for an actor's tort liability. If necessary, such a statement would be more appropriate to a Trial Court Administrative Order.

3.1(c)

This subsection restates the requirement of Trial Court Rule XI(c) directing the police to obtain a determination of probable cause for detention as soon as reasonably possible. It has omitted the administrative details concerning to whom application should be made on weekdays, holidays and weekends contained in Trial Court Rule XI (c) (1) & (2). These details could remain in an amended Trial Court Rule or Administrative Order.

3.1(d)

This subsection incorporates the same requirement for reducing the results of a determination of probable cause for detention to writing and transmitting it to the police as contained in Trial Court Rule XI(e), except for making reference to other means of transmission besides fax machines.

3.1(e)

This subsection deals with the standard that governs the determination of probable cause for detention and the consequence of an affirmative finding. As to the first of these issues, subsection addresses two questions: what the standard should be and the issues to which the standard should be applied. In answering the first question, the Committee chose the same standard as Trial Court Rule XI(b), the standard of probable cause for an arrest warrant. However, the subsection differs from Trial Court Rule XI(b) in the question of what issues must meet this standard. The Trial Court Rule focuses on whether the individual committed one or more of the offenses for which he or she was arrested. The subsection focuses on whether there is probable cause to believe individual committed any offense.

The Committee believed that Rule 3.1 should differ from the Trial Court Rule because the procedure the Rule addresses is directed to the question of probable cause for the arrestee's detention, not whether probable cause existed to justify the person's arrest. Given the nature of the determination, the Committee believes the legality of the arrestee's detention should not depend on the ability of the police to accurately identify the precise offense for which the person should be held. For example, it is sometimes the case that police with probable cause to arrest someone for a particular crime put down the wrong offense on the documents they fill out afterwards. Under the language of Trial Court Rule XI(d), such a person would have to be released despite clear probable cause to charge him or her with the correct crime. Under Rule 3.1, the police could detain such

an individual and charge him or her with the appropriate offense. The way that the Committee dealt with this issue is similar to the rules of other jurisdictions.

The subsection also addresses the issue of the consequence of a determination that there exists probable cause for detention. If probable cause exits, a written finding together with the supporting documents are to be filed with the record of the case. This requirement is the same as that contained in Trial Court Rule XI(e)(1). However, the subsection does not keep the distinction in Trial Court Rule XI(e) between probable cause determinations made by the local court and by others. This distinction is not necessary in the Rules of Criminal Procedure and can be dealt with in an Administrative Order.

3.1(f)

This subsection deals with the issue of the consequence of a determination that there does not exist probable cause for detention. It is essentially the same in this regard as Trial Court Rule XI (e)(3).

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Major issues raised in public comments and Committee responses

In response to a comment by Judge Nesi, the Committee agreed to add language to section 3.1(b) expanding the description of alternative means by which the police could transmit information to the judge or magistrate. In response to comments by the Boston Municipal Court, the Committee agreed to add language from Rule XI to section 3.1(c) making clear that the police must present the information within twenty-four hours.

**

PROPOSED RULE 3.1

Rule 3.1. DETERMINATION OF PROBABLE CAUSE FOR DETENTION

(a) No person shall be held in custody more than twenty-four hours following an arrest, absent exigent circumstances, unless:

(i) a warrant or other judicial process authorizes the person's detention,

(ii) a complaint has been authorized under Rule 3 (g), or

(iii) a determination of probable cause for detention has been made pursuant to subsection (b).

(b) A determination of probable cause for detention shall be made by a judge or magistrate. The judge or magistrate shall consider any information presented by the police, whether or not known at the time of arrest. The police shall present the information under oath or affirmation, or under the pains and penalties of perjury. The police may present the information orally, in person or by any other means, or in writing. If presented in writing, the information may be transmitted to the judge or magistrate by facsimile transmission or by electronic mail or by such other electronic means as may be found acceptable by the court. The determination of probable cause for detention shall be an ex parte proceeding. The person arrested has no right to appear, either in person or by counsel.

(c) Where subsection (a) requires a determination of probable cause for detention, the police shall present the information necessary to obtain such determination to the appropriate judge or magistrate as soon as reasonably possible after the arrest, but no later than twenty-four hours after arrest, absent exigent circumstances.

(d) The judge or magistrate shall promptly reduce to writing his or her determination as to probable cause and notify the police. A copy of the written determination shall be transmitted to the police, by facsimile transmission or other means, as soon as possible.

(e)The judge or magistrate shall apply the same standard in making the determination of probable cause for detention as in deciding whether an arrest warrant should issue. If the judge or magistrate determines that there is probable cause to believe the person arrested committed an offense, the judge or magistrate shall make a written determination of his or her decision which shall be filed with the record of the case together with all the written information submitted by the police.

(f) If there is no probable cause to believe that the person arrested committed an offense, the judge or magistrate shall order the person's prompt release from custody. The order and a written determination of the judge or magistrate's decision shall be filed in the District Court having jurisdiction over the location of the arrest, together with all the written information submitted by the police. These documents shall be filed separately from the records of criminal and delinquency cases, but shall be public records.

**

COMPARISON WITH TRIAL COURT RULE XI

KEY TO REPORTER'S CONVENTIONS

~~Strikethrough~~ = Not included in Rule 3.1
Italics = Retained in substance by Rule 3.1

TRIAL COURT RULE XI UNIFORM RULE FOR PROBABLE CAUSE DETERMINATIONS FOR PERSONS ARRESTED WITHOUT A WARRANT

~~(a) Definitions. In this rule the following words and phrases shall have the following meanings:~~

~~(1) "Judicial officer" means a clerk-magistrate, assistant clerk, temporary clerk-magistrate or temporary assistant clerk. In emergency circumstances, a judge of any department of the Trial Court may act as a judicial officer under this rule.~~

~~No judicial officer shall receive a fee for admitting a person to bail or recognizance in a case in which such judicial officer makes the determination provided for in this rule.~~

~~(2) "Local Court" means the Boston Municipal Court Department, or the division of the District Court Department, the Housing Court Department, or the Juvenile Court Department, with jurisdiction over such offense.~~

~~(3) "Police" means the officer in charge of the place of detention, or his other designee.~~

~~(4) "Weekday" means the period beginning at 8:30 a.m. on Monday and ending at 4:30 p.m. on the following Friday, exclusive of legal holidays.~~

~~(5) "Weekend" means the period beginning at 4:30 p.m. on Friday and ending at 8:30 a.m. on the following Monday.~~

~~(6) "Holiday" means the period beginning at 4:30 p.m. on the day before a legal holiday and ending at 8:30 a.m. on the day after a legal holiday.~~

(b) Right to Probable Cause Determination. *A person who has been arrested for an offense for which no warrant has issued, if not released on bail or recognizance, shall be entitled prior to any extended pretrial detention of a determination by a judicial officer of whether there is probable cause to believe that such person has committed* ~~such offense~~*, except where such person's detention is otherwise authorized by a warrant or other judicial process.*

(c) Time for Determination. *The police shall request such determination from a judicial officer as soon as reasonably possible after such person's arrest. Such request and determination must be made no later than twenty-four hours after arrest, absent exigent circumstances.*

~~(1) On Weekdays. If such determination is requested on a weekday, such determination shall be made by a judicial officer of the local court as soon as reasonably possible. If no judicial officer is in attendance at the local court during normal court hours, such determination shall be made by a judge, or shall be made by a judicial officer of such other division of that court department as has been designated by the chief justice of that department.~~

~~(2) On Weekends and Holidays. If such determination is requested on a weekend or holiday, such determination shall be made by a judicial officer of the Boston Municipal, District, Housing, Juvenile or Superior Court Departments. The Trial Court's Chief Justice for Administration and Management shall establish a rotation to make available~~

~~one or more such judicial officers to make such determinations each weekend and holiday during such hours as the Chief Justice for Administration and Management shall determine. All clerk-magistrates, assistant clerks, temporary clerk-magistrates and temporary assistant clerks of such departments shall participate in such rotation unless exempted by the Chief Justice for Administration and Management because of illness or other personal hardship.~~

(d) Nature of Determination. *A judicial officer shall make such determination prior to arraignment in an ex parte~~, non-adversary and informal~~ proceeding at which the arrestee has no right to be present or to be represented by counsel. Such determination shall be governed by the same legal standards that govern determinations of probable cause to support the issuance of an arrest warrant. In making such determination, the judicial officer shall consider all relevant information that is alleged to constitute probable cause for each offense for which such person has been arrested without a warrant, submitted under oath or affirmation, or under the pains and penalties of perjury, whether or not such information was known at the time of arrest. Such information, if presented in writing, may be transmitted to a judicial officer by facsimile transmission.*

~~A judicial officer's liability for any determination made under this rule shall be governed by the legal standards concerning immunity for legal decisions made by judges and magistrates.~~

(e) Results of Determination. *The judicial officer shall promptly reduce to writing his or her determination as to each offense and notify the police of each determination. A copy of such written determination shall be transmitted to the police as soon as possible. Such copy may be transmitted by facsimile transmission.*

(1) Probable Cause Found by Judicial Officer of Local Court. *If a judicial officer of the local court determines that there is probable cause to believe that such arrestee committed one or more of the offenses* ~~for which he or she was arrested~~*, the judicial officer shall file with such court copies of his or her written determination and of any written statement of facts submitted to him or her. Such determination, and any such written statement of facts, shall be filed and docketed with the record of such case, and shall be a public record.*

~~(2) Probable Cause Found by Other Judicial Officer. If a judicial officer other than a judicial officer of the local court determines that there is probable cause to believe that such arrestee committed one or more of the offenses for which he or she was arrested, the judicial officer shall direct the police to file with the local court, together with the application for complaint for such offense, copies of the judicial officer's written determination and of any written statement of facts submitted to him or her. Such determination, and such written statement of facts, shall be filed and docketed with the record of such case, and shall be a public record.~~

(3) No Probable Cause Found. *If a judicial officer determines that there is no probable cause to believe that the arrestee committed* ~~any of the offenses for which he or she was arrested~~*, the police shall promptly release such arrestee from pretrial detention for such*

offenses. The judicial officer shall file with the local court copies of his or her written determination and of any written statement of facts submitted to him or her. Such determination, and any such written statement of facts, shall be filed separately from the records of criminal and delinquency cases, but shall be a public record.

RULE 5 -- THE GRAND JURY

Summary and Explanation of Revisions

The only change of substance in the Rule was to conform the number of veniremen called for grand jury duty to the statutes that require different numbers in different counties. The Committee considered and rejected a proposal to require all statements before the grand jury to be recorded and a proposal dealing with the custody of grand jury minutes.

5(a)

The number of veniremen that shall be summoned to form a grand jury differs by statute from county to county. Although in most counties, the law provides for forty-five veniremen (*see* M.G.L. Ch. 277 § 1), in Middlesex thirty-five people are to be summoned (*see* M.G.L. Ch. 277 §2B) and in Worcester, Norfolk and Bristol the number is fifty (*see* M.G.L. Ch. 277 §§ 2E, 2F, & 2H). The amendment avoids giving a specific number.

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PROPOSED RULE 5

Rule 5. THE GRAND JURY

(a) Summoning Grand Juries. As prescribed by law, the appropriate number of jurors shall be summoned in the manner and at the time required, from among whom the court shall select not more than twenty-three grand jurors to serve in said court as long as and at those specific times required by law, or as required by the court.

The regular grand jury shall be called upon and directed to sit by the Administrative Justice for the Superior Court Department whenever within his or her discretion the conduct of regular criminal business and timely prosecution within a particular county so dictate. Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

(b) Foreperson, Foreperson Pro Tem; Clerk, Clerk Pro Tem. After the grand jurors have been impanelled they shall retire and elect one of their number as foreperson. The foreperson and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the foreperson shall, under his or her hand, return to the court a list of all witnesses sworn before the grand jury during the sitting. If the foreperson is unable to serve for any part of the period the grand jurors are required to serve, a foreperson pro tem shall be elected in the same manner as provided herein for election of the foreperson. The foreperson pro tem shall serve until the foreperson returns or for the remainder of the term if the foreperson is unable to return. The grand jury may also appoint one of their number as clerk to be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the attorney general or district attorney. If the clerk is unable to

serve for any part of the period the grand jurors are required to serve, a clerk pro tem may be appointed.

(c) Who May be Present. Attorneys for the Commonwealth who are necessary or convenient to the presentation of the evidence, the witness under examination, the attorney for the witness, and such other persons who are necessary or convenient to the presentation of the evidence may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney. No witness may refuse to appear because of unavailability of counsel for that witness.

(d) Secrecy of Proceedings and Disclosures. The judge may direct that an indictment be kept secret until after arrest. In such an instance, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law.

(e) Finding and Return of Indictment. An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court.

(f) No Bill; Discharge of Defendant. The grand jury shall during its session make a daily return to the court of all cases as to which it has determined not to present an indictment against an accused. Each such complaint shall be endorsed "no bill" and shall be filed with the court.

If upon the filing of a no bill the accused is held on process, he or she shall be discharged unless held on other process.

(g) Deliberation. The prosecuting attorney shall not be present during deliberation and voting except at the request of the grand jury.

(h) Discharge. A grand jury shall serve until the first sitting of the next authorized grand jury unless it is discharged sooner by the court or unless its service is extended to complete an investigation then in progress.

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PROPOSED RULE 5 -- SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

RULE 5. THE GRAND JURY

~~(Applicable to District Court and Superior Court)~~

(a) Summoning Grand Juries. **As prescribed by law, the appropriate number of jurors** ~~There~~ shall be summoned in the manner and at the time **required,** ~~prescribed by law forty-five veniremen~~ from among whom the court shall select not more than twenty-three grand jurors to serve in said court as long as and at those specific times required by law, or as required by the court.

The regular grand jury shall be called upon and directed to sit by the Administrative Justice for the Superior Court Department whenever within his **or her** discretion the conduct of regular criminal business and timely prosecution within a particular county so dictate. Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

(b) ~~Foreman~~ **Foreperson**, ~~Foreman~~ **Foreperson** Pro Tem; Clerk, Clerk Pro Tem. After the grand jurors have been impanelled they shall retire and elect one of their number as ~~foreman~~ **foreperson**. The ~~foreman~~ **foreperson** and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the ~~foreman~~ **foreperson** shall, under his **or her** hand, return to the court a list of all witnesses sworn before the grand jury during the sitting. If the ~~foreman~~ **foreperson** is unable to serve for any part of the period the grand jurors are required to serve, a ~~foreman~~ **foreperson** pro tem shall be elected in the same manner as provided herein for election of the ~~foreman~~ **foreperson**. The ~~foreman~~ **foreperson** pro tem shall serve until the ~~foreman~~ **foreperson** returns or for the remainder of the term if the ~~foreman~~ **foreperson** is unable to return. The grand jury may also appoint one of their number as clerk to be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the attorney general or district attorney. If the clerk is unable to serve for any part of the period the grand jurors are required to serve, a clerk pro tem may be appointed.

(c) Who May be Present. Attorneys for the Commonwealth who are necessary or convenient to the presentation of the evidence, the witness under examination, the attorney for the witness, and such other persons who are necessary or convenient to the

presentation of the evidence may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney. No witness may refuse to appear because of unavailability of counsel for that witness.

(d) Secrecy of Proceedings and Disclosures. The judge may direct that an indictment be kept secret until after arrest. In such an instance, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occuring before the grand jury except in the performance of his **or her** official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law.

(e) Finding and Return of Indictment. An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court.

(f) No Bill; Discharge of Defendant. The grand jury shall during its session make a daily return to the court of all cases as to which it has determined not to present an indictment against an accused. Each such complaint shall be endorsed "no bill" and shall be filed with the court.

If upon the filing of a no bill the accused is held on process, he **or she** shall be discharged unless held on other process.

(g) Deliberation. The prosecuting attorney shall not be present during deliberation and voting except at the request of the grand jury.

(h) Discharge. A grand jury shall serve until the first sitting of the next authorized grand jury unless it is discharged sooner by the court or unless its service is extended to complete an investigation then in progress.

RULE 7 -- INITIAL APPEARANCE AND ARRAIGNMENT

Summary and Explanation of Revisions

Rule 7 governs the initial appearance and arraignment. The framework and most provisions of Rule 7 remain intact, but our proposal includes revisions in the following four areas.

First, the appearance of counsel provision (Rule 7(b)) has been changed to provide a more workable solution when counsel is present but unable to submit an appearance covering representation throughout the case. Assistant district attorneys often do not represent the Commonwealth in a case from beginning to end, and sometimes a public defender or bar advocate is on duty for bail and arraignment sessions only. When fully competent representation is available for such limited purposes, Rule 7 should facilitate rather than deflect progress in the case.

Under the proposed rule, an appearance in the name of the prosecuting office is permitted, but this requires the office (a) to ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and (b) upon request of the court or other counsel, identify the prosecutor then assigned to the case. These requirements are important to ameliorate a frequent difficulty in district court practice: defense counsel are too often unable to speak with a district attorney about the case between arraignment and the next scheduled day, because no assistant district attorney is yet assigned to it or (if one has been) familiar with it. As to defense counsel, absent other more restrictive provisions in other court rules, Rule 7(b) permits the court to accept an appearance for a limited, specified period when counsel cannot offer a general appearance.[2] The withdrawal provisions remain unchanged..

The appearance of counsel provisions have also been unified so that a single procedure governs both the Superior and District Courts. The existing rule has distinct and more complicated procedures for the two courts, but the differences do not reflect significantly different needs for the two courts in our judgment.

Second, Rule 7(d) adds the requirement that the defendant's record be provided at arraignment, something that customarily occurs at present and is required by the Dist./Mun Court Rules. Although certain police statements must also be provided at a District Court arraignment according to the Dist./Mun. Court rules, the Committee voted not to adopt that provision in its draft, but rather note the District Court requirement in the Reporter's Notes.

Third, 7(d) also mandates an opportunity at arraignment for the parties to seek an order to preserve evidence that is not subject to a Rule 14 discovery order. For example, Commonwealth agencies not working on the case, or a private party, may have relevant

[2] District Court/BMC Rule of Criminal Procedure 3(e) contains an appearance of counsel rule. In our view, nothing in the District Court provision conflicts with our Proposed Rule 7(b).

evidence that might be destroyed absent court action. Under Proposed Rule 14(a)(1)(E), the parties may move for an order preserving this evidence. Rule 7(d) simply guarantees the parties an opportunity to be heard on this motion at the initial appearance, since expedition may be crucial in such cases.[3]

Finally, Rule 7(e) has been added to specify the court dates that should be scheduled at the initial appearance. It requires at any District Court arraignment that an order scheduling pretrial proceedings be issued, and distinguishes between the "probable cause track" and the "pretrial conference/pretrial hearing" track. The latter track requires the court to schedule both a pretrial conference (between the attorneys) and a pretrial hearing. As to the former, some District Court arraignments are continued for probable cause hearings rather than pretrial conferences. Under the statutory mandate that probable cause hearings be held "as soon as may be", G.L. 276 s. 38, the Court should not assign any intervening pretrial conferences or hearings when it must or intends to bind over the case. The addition of a "probable cause track" is necessary to effectuate this statutory requirement. However, nothing in Rule 7(e) prevents the court from subsequently continuing the probable cause hearing to another date, or (in concurrent jurisdiction cases) from ordering a short continuance of the initial hearing to permit counsel to prepare arguments on whether district court jurisdiction should be declined.

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Major issues raised in public comments and Committee responses

(1) the original proposal required that when a "district attorney's office" appearance is filed, that office designate 7 days before each court hearing the individual assigned to represent the Commonwealth at that hearing, and provide notice of such on request. In response to comments from the BMC and the district attorney's offices for Plymouth and Essex, this was changed to remove the 7 day requirement. Instead, the office must assure that an individual is assigned to the case at all times during the office's appearance.

(2) The Boston Municipal Court's comment noted that defense counsel may withdraw without court permission in certain circumstances, but not the prosecutor. It suggested that a single standard should control for counsel to both sides. The Committee unanimously decided not to revise the proposed rule. Flexibility for the individual prosecutor is provided by allowing for shifts among personnel in the District Attorney's

[3] Proposed Rule 14(a)(1)(E) contains the following provisions: "Notice and preservation of evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A) exists, except that it is not within the prosecution's possession, custody or control, the prosecution shall notify the defendant of the existence and location of the item. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The Court shall hear and rule upon the motion expeditiously. The Court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means."

Office, with no similar concession for defense counsel. To change the rule to permit the District Attorney's office itself to withdraw, when it is the agency bringing the charges, should require court acquiescence.

(3) The 2003 Hunt Minority Report objects to Rule 7's requirement that arraignment judges schedule a probable cause hearing in cases that will be bound for Superior Court trial. This issue, which also arises with regard to a provision of Rule 3, is addressed in the section on Rule 3, *supra*, at pages 11-13.

(4) The 2003 Hunt minority report objects to Rule 7's reference to Rule 14(a)(1)(E), which allows a party to move to preserve evidence.[4] The objection is that the entity or person holding the evidence may not be in court at arraignment to contest such an order. We believe that evidence that could be determinative of guilt or innocence should not be subject to an individual's unfettered decision to destroy it in cases where counsel for a party considers preservation important. The Court may issue a temporary order and provide the non-party an opportunity to contest a permanent order, and under subsection 14(a)(1)(E)(ii) also has the authority to "modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means."

(5) The 2003 Hunt minority report questions whether the arraignment judge should set dates for the pretrial conference and pretrial hearing.[5] This provision, in Proposed Rules 7(e) and also 11(a) and 11(b) , is addressed in the discussion of Rule 11 *infra,* at page 40, para. number 5.

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PROPOSED RULE 7

RULE 7. INITIAL APPEARANCE AND ARRAIGNMENT

(a) Initial Appearance.

(1) Upon Arrest. A defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office**.** At that time the defendant shall be interviewed by the probation department; the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide

[4] 2003 Hunt minority report, p. 11.

[5] 2003 Hunt minority report, p. 11.

representation for the defendant. The judge or special magistrate shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any.

(2) Upon Summons**;** waiver of initial appearance. A summonsed defendant who has retained counsel shall be excused from appearing on the return day if such counsel enters an appearance for the defendant prior to the return day, stating thereon that he or she has conferred with the defendant and requests that the case be scheduled for pretrial hearing or other proceeding. Defendant's counsel shall inform the defendant of the date of the next scheduled event which shall require the defendant's presence.

(b) Appearance of Counsel

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the initial appearance or, if the defendant was summonsed to appear, on or before the scheduled return day. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, address, and telephone number of the attorney.

(2) Effect; Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that if on the return day such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the return day wishes to withdraw the appearance, he or she may do so within fourteen days after the return day, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) Notice. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

(c) Arraignment. Arraignment shall consist of the reading of the charges to the defendant and the entry of the defendant's plea to those charges.

(1) Waiver of Reading of Charges. At arraignment the reading of the charges may be waived in open court by the defendant if he or she is represented by counsel.

(2) Entry of Not Guilty Plea. If a defendant is excused from appearing in court on the return day pursuant to this rule, a plea of not guilty shall be entered by the court on the defendant's behalf.

(d) Provision of criminal record; preservation of evidence. The court shall ensure that at or before arraignment, (1) a copy of the defendant's criminal record as compiled by the Commissioner of Probation, if any, is provided to the defense and to the prosecution, and (2) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(e) Order scheduling pretrial proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

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PROPOSED RULE 7 -- SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

RULE 7. INITIAL APPEARANCE AND ARRAIGNMENT

~~(Applicable to District and Superior Court)~~

(a) Initial Appearance.

(1) Upon Arrest. A defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office**.** At that time the defendant shall be interviewed by the probation department; the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived ~~his~~ **the** right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant. The judge or special magistrate

shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any.

(2) Upon Summons**; waiver of initial appearance**. A **summonsed** defendant who has retained counsel shall be excused from appearing on the return day if such counsel enters an appearance for the defendant prior to the return day**, stating thereon that he or she has conferred with the defendant and requests that the case be scheduled for pretrial hearing or other proceeding.** Defendant's counsel shall inform the defendant of the date of the next scheduled event which shall require the defendant's presence.

~~*(b) Appearance of Counsel in District Court. If a defendant has retained counsel and wishes to be excused from appearing in court on the return day, counsel shall, prior to the scheduled return day, enter an appearance on behalf of the defendant. An appearance shall be entered by filing, either by personally appearing before the clerk or by mailing an appearance slip, which shall include the name, address, and telephone number of counsel, shall state that counsel has conferred with the defendant, and shall request that the case be scheduled for trial or other proceeding.*~~

~~(c)~~ **(b)** Appearance of Counsel ~~in Superior Court.~~

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney **on or before the initial appearance or, if the defendant was summonsed to appear,** on or before the scheduled return day**. The appearance may be entered** either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, address, and telephone number of the attorney.

(2) Effect; Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case**, except that if on the return day such a representation cannot be made and no contrary legal restriction applies**, **(1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case.** ~~If on the return day such a representation cannot be made, an appearance shall be made by the attorney who shall represent the defendant or who shall prosecute the case within fourteen days after the return day or at such other time as the court may allow.~~ If the attorney who files an appearance for the defendant on or before the return day wishes to withdraw ~~his~~ **the** appearance, he **or she** may do so within fourteen days after the return day, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) Notice. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

~~(d)~~ **(c)** Arraignment. Arraignment shall consist of the reading of the charges to the defendant and the entry of the defendant's plea to those charges.

(1) Waiver of Reading of Charges. At arraignment the reading of the charges may be waived in open court by the defendant if he **or she** is represented by counsel.

(2) Entry of Not Guilty Plea. If a defendant is excused from appearing in court on the return day pursuant to this rule, a plea of not guilty shall be entered by the court on the defendant's behalf.

(d) Provision of criminal record; preservation of evidence. The court shall ensure that at or before arraignment, (1) a copy of the defendant's criminal record as compiled by the Commissioner of Probation, if any, is provided to the defense and to the prosecution, and (2) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(e) Order scheduling pretrial proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

RULE 11 -- PRETRIAL CONFERENCE AND PRETRIAL HEARING

Summary and Explanation of Revisions

Currently the Superior Court, BMC, District Court and Juvenile Court all require pretrial conferences and hearings, but the procedures vary. Present Rule 11 mandates these events only in the Superior Court and in District Court *jury* sessions, but under the single trial legislation they must now occur in all other District Court sessions. So Rule 11 *must* be rewritten to comport with the legislation, and *should* be rewritten to provide uniform rules to the extent practicable.

Under this proposed rule, at arraignment (except on a complaint regarding which the court will not exercise final jurisdiction, in which case a probable cause hearing will be scheduled as required by Rule 7), the court will schedule the case for both a pretrial conference and a pretrial hearing, to be held on separate dates. Regarding the *pretrial conference*, the rule allows but does not require the court to schedule this conference to take place before a judge or magistrate. Following the conference, the parties will prepare a pretrial conference report, memorializing their agreements and disagreements. This report controls the scope of subsequent motions practice. Failure to raise an issue in the report may foreclose a subsequent motion and waive that issue forever.

Rule 11 also mandates a *pretrial hearing* on a subsequent date (except on a complaint regarding which the court will not exercise final jurisdiction), at which a plea may be taken or pretrial matters may be raised and/or resolved. The rule further sets out the functions of the pretrial conference, the report, and the pretrial hearing. Additionally, if discovery remains incomplete at the time of the pretrial hearing, a compliance hearing will be scheduled to insure that discovery is complete before the case proceeds.

Reconciliation of differences among the trial courts:

Under the District/Municipal Court Rules of Criminal Procedure, the court at arraignment must order *both* a pretrial conference and a pretrial hearing.[6] Additionally, a pretrial conference report must be filed by the date of the hearing.[7] Rule 11 has been rewritten to reflect this two step process, setting out the functions of the pretrial conference, the report, and the pretrial hearing. However, the Dist./Mun. Ct. Rules set out somewhat different, if minor, procedures for the BMC and the District Court, and we believe strongly that the Massachusetts Rules of Criminal Procedure should not simply preserve these differences. Our rules should be uniform whenever practicable -- indeed, *when consistent with the needs of each of the trial courts*, we are striving to create one set of rules which applies not only to the District Court, BMC, and Juvenile Court, but to the Superior Court as well -- and so we have opted for what appears to us to be the most

[6] District/Municipal Court Rule of Criminal Procedure 3(c).

[7] District/Municipal Court Rule of Criminal Procedure 4(d).

sensible set of alternative procedures contained in the amalgam that is the Dist./Mun. Court Rules. We believe that our resolution is a good one for the Superior Court as well.

Specifically, we have resolved the internal conflicts within the Dist./Mun. Court Rules as follows:

(1) Under Dist./Mun. Court Rule 3(c), *the BMC procedure* directs the arraignment judge to schedule a date certain for the pretrial conference, which is then held before a magistrate. *The District Court procedure* directs the judge to order a conference, but does not require it to be held in court or on any particular day.

We have resolved the conflict by requiring the arraignment judge to order a pretrial conference be held on a date certain, but Rule 11 will only allow -- not require -- the court to order the conference to be held in front of a magistrate. We believe that if Rule 11 fails to require a date certain, attorneys will fail to conference the case until they arrive at the hearing, not only creating hearing delays but leaving the parties relatively unprepared for what should be a business day. This has been the unfortunate practice under the original Rule 11 since 1979; too often conferences occur hurriedly on the pretrial hearing date. While we would also like to adopt the BMC practice of a conference before a magistrate, which we believe has proven quite efficient, we are concerned that many district courts will not have adequate personnel and courtrooms for this purpose, so we have left this issue flexible, to be determined by each court.

(2) Under the Dist./Mun. Court Rule 5, in District Court a party's failure to provide discovery by the pretrial hearing leads to a separate "compliance-election" hearing -- so-called because on this date the parties return and, if they indicate all discovery has *now* been completed, the defendant elects or waives a jury trial. (Under M.G.L. c. 218 sec. 26A and Dist./Mun Rule 4(e), no jury waiver may be received until discovery is complete.[8]) In the BMC, however, a compliance date will be ordered but the hearing itself is optional with the court. In our view, this conflict should be resolved, and resolved in favor of a mandatory compliance hearing, for two reasons. First, the issue most often arises when a party has already failed to meet the court's requirements, and absent a compliance date in court we presume a significant number will fail to meet the new date as well. When this occurs, the aggrieved party faces an inefficient and unfair choice between trying to obtain an expedited hearing (which may prove difficult) or waiting until the trial date to receive discovery. Second, dispensing with a compliance hearing will in most cases simply delay the tender of a plea, piling up cases in the trial session which will never be tried. Rather than sending papers, parties and witnesses to the trial session, where most often the court will merely assess compliance and take a plea, we believe a compliance hearing will allow for disposition of a large number of cases in the primary court. We have added a new section dealing with the compliance hearing, mostly derived from the requirements as delineated in Dist./Mun. Ct. Rule 5.

[8] MGL 218 sec. 26A provides that "No decision on such waiver shall be received until after the completion of a pretrial conference and a hearing on the results of such conference and until after the disposition of any pretrial discovery motions and compliance with any order of the court pursuant to said motions."

Additional revisions:

--Existing subdivision (a)(1)(c) has been eliminated. This provision required the defendant to reveal "the nature of the defense" and whether s/he intends to defend by alibi, insanity or privilege. We have eliminated this provision for several reasons. First, prosecutorial discovery is already mandatory through Proposed Rule 14. Second, the pretrial conference is generally held too early to expect the defendant to know and convey the defense, especially since full discovery may not yet have been provided by the prosecution. Indeed, because under the fifth and fourteenth amendments the defendant can only be compelled to disclose information s/he has decided to use at trial, *Williams v. Florida*, 399 U.S. 78 (1970), prosecutorial discovery should not be required before the defendant is in a position to make an informed decision. Third, the one-sided requirement that the defense, and not the prosecution, reveal its case at the pretrial conference prior to discovery is suspect under *Wardius v. Oregon*, 412 US 470 (1973)(unanimously finding a violation of due process when the defendant but not the government was required to provide discovery).

-- Subdivision (b)(3)(ii) requires the pretrial hearing judge to hear all pending discovery motions, and permits him or her to hear other pretrial motions as well.

-- Subdivisions 11(b) and 11(c) provide that after discovery is complete the court (at the pretrial hearing, or if one was necessary the compliance hearing) schedule "the trial date or trial assignment date." Ideally, the rule would simply require a date certain for trial to be scheduled at this time, rather than offering the option of scheduling a "trial assignment date," which allows for yet another intermediate hearing date and keeps all parties and witnesses in suspense as to the actual trial date. However, practical constraints were deemed to require this option, as many courts would be unable to guarantee a particular trial date as early as the pretrial hearing.

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Major issues raised in public comments and minority reports, and Committee responses

(1) Existing Rule 11 does not include a "decline of jurisdiction decision" as a possible ingredient of the pretrial conference or pretrial hearing in district court. The Committee added such a provision into the proposed rule, but has now deleted it, agreeing with the comment submitted by the Essex District Attorney's Office that the decline decision be maintained as a component of arraignment under rule 7(e). The Committee also instructed the Reporters to include in their Commentary to Rule 7 that nothing prevents the arraignment judge from granting a short continuance to allow counsel to prepare arguments on whether the district court should decline jurisdiction on a case. The new proposed rule essentially maintains the alternative options that currently exist. Under existing practice, the arraignment court *must* schedule a probable cause hearing if the complaint is outside of the district court's subject matter jurisdiction; and as to complaints within concurrent jurisdiction, district courts *may* decline jurisdiction – which sometimes occurs at arraignment (often when the defendant is charged with an

extremely serious crime, faces companion charges outside the district court's jurisdiction, or is a multiple recidivist) and sometimes at subsequent hearing scheduled for argument on the issue.

(2) One comment asked the Committee to add a requirement that the pretrial conference be held before a magistrate in all cases. The Committee unanimously declined to adopt this suggestion, with discussion indicating concern that many courts would not have the resources to institute such a requirement.

(3) The proposed rule makes a compliance date mandatory in all courts *if* a party failed to provide discovery as required, unless the aggrieved party waives such a hearing. One comment urged the Committee to eliminate this requirement, and continue the difference between the district courts (which require a compliance hearing when discovery orders have been flouted) and the BMC (which does not). The Committee declined this suggestion by a vote of 10-1, believing that requiring a compliance hearing when discovery orders have been flouted is the most efficient and fair arrangement. Interviews by the reporter with several practitioners who frequently practice in the Boston Municipal Court indicated that the absence of a compliance hearing in after discovery defaults is a source of great dissatisfaction. The reporters suggested that the compliance hearing requirement is desirable for three reasons. First, the issue most often arises when a party has already failed to meet the court's requirements, and absent a compliance date in court we presume a significant number will fail to meet the new date as well. When this occurs, the aggrieved party faces an inefficient and unfair choice between (a) trying to obtain an expedited hearing (which may prove difficult) simply in order to obtain the discovery that was previously ordered, or (b) waiting until the trial date to receive discovery. If the latter, and if counsel intends to go to trial, he or she may require a continuance to prepare, with witnesses told to come back on a later date; or unprepared counsel may be ordered to proceed with trial, making the discovery requirements a nullity. Second, in the absence of an in-court compliance hearing, jury waivers must be deferred until trial date in the BMC and district courts, because as noted MGL 218 sec. 28 provides that "no decision on such waiver shall be received until after… the disposition of any pretrial discovery motions and compliance with any order of the court pursuant to said motions." It promotes further delays and inconvenience to witnesses for the court to remain ignorant up to the trial date as to whether a jury session will be required. Third, even if counsel does *not* intend to go to trial, dispensing with compliance hearings merely delays the tender of a plea, piling up cases in the trial session that will never be tried. Rather than sending papers, parties and witnesses to the trial session, where most often the court will merely assess compliance and take a plea, we believe a compliance hearing will allow for disposition of a large number of cases in the primary court.

(4) A comment from Professor Wendy Kaplan of the Boston University clinical defender program asked that a second pretrial conference date be scheduled if defendant defaults because in some instances the default may be due to lack of notice or circumstances beyond the defendant's control. This suggestion was unanimously rejected.

(5) Chief Justice Zoll's comment suggested that rule 11 permit but not require the court to set a date certain for the pretrial conference. The 2003 Hunt Minority Report, p. 11, questioned whether setting pretrial conference and pretrial hearing dates at arraignment will be realistic. On the other hand, that minority report also recognized that setting these pretrial dates at arraignment "has advantages in requiring both counsel to attend to the case expeditiously and in the court keeping control of the docket;" and the comments of both the Plymouth D.A.'s office and Prof. Kaplan favored proposed rule 11's two-step process that requires separate dates for a pretrial conference and a pretrial hearing. The Committee declined to revise the rule. It is likely that unless the rule requires a specific pretrial conference date, attorneys will fail to conference the case until they arrive at the pretrial hearing, not only creating hearing delays but leaving the parties relatively unprepared for what should be a business day. This has been the unfortunate practice under the original Rule 11 since 1979 in those courts that do not assign a separate conference date. In contrast, as the BMC comment noted, its practice of assigning a pretrial conference date prior to the pretrial hearing has worked well.

(6) A suggestion by the Essex District Attorney's office that courts be barred from declining jurisdiction over objection of Commonwealth was also rejected. No need for such a provision was demonstrated, and in any event, this proposal would change case law holding that the decline or acceptance of jurisdiction is decided by the judge, not the prosecutor. Commonwealth v. DeFuria, 400 Mass. 485, 488 (1987); Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 78–79 (1983); Corey v. Commonwealth, 364 Mass. 137, 143 n.9 (1973). *See also* Commonwealth v. Lussier, Sup. Ct. No. 92-1970-001-003 (Memorandum and Order of 5/24/1993, Neel, J.)(dismissing indictments that followed a probable-cause hearing held because the judge did not exercise his judgment but deferred to the prosecutor; the court must exercise its discretion in deciding whether a concurrent jurisdiction offense should be a trial or a probable cause hearing and cannot simply defer to the prosecutor's wishes).

(7) The 2003 Hunt Minority Report, at 12, states that "there is nothing in rule 11 to indicate that the Commonwealth must be afforded sufficient time before trial to seek and obtain reciprocal discovery and then to file its own nondiscovery motions." However, Proposed Rule 11 does not concern the schedule for filing motions – Proposed Rule 13 does. As to reciprocal discovery, the Commonwealth need not file any motions to be entitled to reciprocal discovery under Rule 14, but it may file discovery motions to the degree that it seeks additional materials than provided automatically. In such a case, the Commonwealth should file its reciprocal discovery motions prior to the conclusion of the pretrial hearing, assuming it has provided the defense with its automatic discovery by then (as reciprocal discovery begins after defense discovery has been delivered pursuant to Rule 14(a)(1)(B). If "the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing," or if "the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing," (Rule 13(d)(1), the Commonwealth may file its reciprocal discovery motions at a later time. As to non-discovery motions, Rule 13(d)(2) states that they must be filed by all parties no later than 21 days after assignment of the trial date unless the court permits later filing for good cause. The minority report points to nothing in this schedule that should be deemed unrealistic, and Rule 13 explicitly provides the court

with all the discretion necessary to address unusual cases where motions could not have been filed earlier.

(8) The 2003 Hunt Minority Report, at 13, comments that jury waivers are rare and that there is "little need for the waiver or claim of jury trial to occur until the time of trial other than to permit the court to estimate how many jurors will be needed for a particular day." It suggests waiting until the trial day to determine whether the defendant will waive or claim a jury trial, except where the district court does not have a jury session. However, district courts now inquire as to jury waiver at the pretrial hearing (or when discovery has not been completed, at the subsequent compliance hearing), as they are required to do under Dist./Mun. Ct. Rule of Criminal Procedure 4(e).[9] Moreover, M.G.L. c. 278, sec. 18 provides a presumptive deadline for non-discovery motions of 21 days *after* the waiver decision (or later for good cause shown), as does a district court rule.[10] Therefore, the minority report suggestion would conflict with existing legislation governing district court. As to Superior Court, the Committee believes that soliciting the defendant's decision before assignment for trial can facilitate a more efficient and predictable system, and nothing in the rule prevents a waiver of jury trial at a later date in any event.

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PROPOSED RULE 11

Rule 11. PRETRIAL CONFERENCE AND PRETRIAL HEARING

(a) The Pretrial Conference.

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

> (1) Conference Agenda. Among those issues to be discussed at the pretrial conference are:
>
> (A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).
>
> (B) Whether the case can be disposed of without a trial.

[9] This subsection provides: "When the pretrial conference report is submitted, the court shall examine it for completeness, shall rule on any disputed discovery issues, and, unless discovery compliance is still pending, shall inquire if the defendant waives the right to jury trial."

[10] Dist./Mun. Ct. Rule of Criminal Procedure 6(a)(2).

(C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

(2) Conference Report.

(A) Filing. A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

(b) The Pretrial Hearing

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for attendance at the hearing. The pretrial hearing may include the following events:

(1) Tender of Plea. The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) Pretrial matters. Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) Compliance and trial assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

(c) Compliance Hearing

A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

(1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) receiving and acting on a tender of plea or admission; and

(3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

**

PROPOSED RULE 11 – SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

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Bold = addition to rule

Rule 11. PRETRIAL CONFERENCE **AND PRETRIAL HEARING**

~~(Applicable to District Court and Superior Court)~~

(a) ~~Superior Court: Jury Sessions in District Court~~ **The Pretrial Conference**

At arraignment, **except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order t**he prosecuting attorney and **defense** counsel ~~for the defendant shall~~ **to** attend a pretrial conference **on a date certain** to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. ~~Except in extraordinary circumstances, no judge or special magistrate need participate in a pretrial conference.~~ **The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.**

(1) Conference Agenda. Among those issues to be discussed at the pretrial conference are:

(A) **Discovery and all other** ~~Those~~ matters which, **absent agreement of the parties,** must be raised by pretrial motion. All motions which cannot be agreed upon shall be ~~promptly~~ filed pursuant to Rule 13(d)~~(2)(A)~~.

(B) Whether the case can be disposed of ~~by means of a plea~~ **without a trial.**

~~(C) The nature of the defense, including whether the defendant intends to rely upon a defense of alibi; a defense of lack of criminal responsibility because of mental disease or defect; or a defense based upon a license, claim of authority, ownership, or exemption.~~

~~(D)~~ (C) If the case is to be tried, (i) the setting of a **proposed** trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) ~~whether trial will be with or without jury; (iii)~~ the probable length of trial; ~~(iv)~~ **(iii)** the availability of necessary witnesses; and ~~(v)~~ **(iv)** whether issues of fact can be resolved by stipulation.

(2) Conference Report.

(A) Filing. A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court ~~at a time set by the judge or special magistrate on the return day, that time to be no later than twenty-one days after the return day.~~ **pursuant to subdivision (b)(2)(i).** The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall ~~appear at the scheduled time and~~ notify the clerk of such failure. If a conference report is not filed and a party does not

appear at the ~~scheduled time~~ **pretrial hearing**, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report ~~and~~ **or** do not appear at the ~~scheduled time~~ **pretrial hearing**, ~~the clerk shall notify the judge and~~ the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

~~*(b) District Court Jury-Waived Sessions.*~~

~~*(1) Conference Agenda. On the return day the prosecuting attorney and counsel for the defendant may be ordered to attend a pretrial conference to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. Except in extraordinary circumstances, no judge need participate in a pretrial conference.*~~

~~*Among those issues to be discussed at the pretrial conference are:*~~

~~*(A) Those matters which must be raised by pretrial motion. All motions which cannot be agreed upon shall be promptly filed pursuant to Rule 13(d)(1)(B).*~~

~~*(B) Whether the case can be disposed of by means of a plea.*~~

~~*(C) The nature of the defense, including whether the defendant intends to rely upon a defense of alibi; a defense of lack of criminal responsibility because of mental disease or defect; or a defense based upon a license, claim of authority, ownership, or exemption.*~~

~~*(D) If the case is to be tried, (i) the probable length of trial; (ii) the availability of necessary witnesses; (iii) whether issues of fact can be resolved by stipulation, and (iv) if the case is within the concurrent jurisdiction of the District Court and Superior Courts, whether the defendant will request to be bound over for trial in the Superior Court.*~~

~~*(2) Conference Report.*~~

~~*(A) Filing. A conference report, subscribed by the prosecuting officer and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court at a time set by the judge. The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.*~~

~~*(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall appear at the scheduled time and notify the clerk of such failure. If a conference report is not filed and a party does not appear at the scheduled time, no request of that party for a continuance of the trial*~~

~~*date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report and do not appear at the scheduled time, the judge shall schedule the case for trial. The parties shall be subject to such other sanctions as the judge may impose.*~~

~~*(C) Elective Filing. Notwithstanding the absence of an order pursuant to subdivision (b)(1) of this rule, the parties may, no later than five days prior to trial or within such other time as the judge may allow, elect to file a conference report.*~~

(b) The Pretrial Hearing

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for attendance at the hearing. The pretrial hearing may include the following events:

(1) Tender of Plea. The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) Pretrial matters. Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) Compliance and trial assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

(c) Compliance Hearing

A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

(1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) receiving and acting on a tender of plea or admission; and

(3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

RULE 12 -- PLEAS AND WITHDRAWALS OF PLEAS

Summary and Explanation of Revisions

The basic structure of the guilty plea procedure described in Rule 12 has been retained. The amendments bring the details of the process up to date since the Rule was originally adopted in 1979, in light of the abolition of trial de novo and other developments in the law. The Committee considered and rejected a number of more fundamental changes that would have affected the process in the Superior Court, such as adding the defense cap plea procedure and admissions to sufficient facts that exist in the District Court. The Committee also decided not to recommend that the Rule refer to sentencing guidelines, given the uncertainty of their adoption.

12(a)(1)

When Rule 12 was first promulgated in 1979, tape recording in the District Court system was a relatively new phenomenon. Since tape recorders are now standard in every courtroom, there is no reason to allude to the possibility that a guilty plea cannot be recorded.

12(a)(2)

With the abolition of trial de novo, the reference in the original rule to the jury-waived session of the District Court is outmoded.

12(a)(3)

The reasons that may underlie a decision to refuse to accept a guilty plea or plea of nolo contendere also apply to situations where the defendant may offer an admission to sufficient facts. The rule was amended to make clear that the defendant needs the judge's permission to waive a trial under all three circumstances. Since admissions to sufficient facts entail the same waiver of constitutional rights as do guilty pleas, this section was also amended to make clear that a judge should not accept an admission unless it is knowing and voluntary.

12(b)(1)(C)

Rule 12 (b) (1) describes the different types of plea agreements that the defendant and the prosecutor may reach. In the original, it did not explicitly mention a relatively common type of plea agreement: a joint recommendation that the defendant receive a specific sentence, with the expectation that the defendant will be able to withdraw the plea if the judge does not concur. The cross reference to subdivision (b)(1)(C) in Rule 12(c)(6) seems to contemplate that (b)(1)(C) includes not only recommendations where the defendant reserves the right to ask for a lesser sentence, but joint recommendations as well. The amendment adds language to make this point clear.

12(c)(2)

This subdivision has been amended to take into account the provision for a defense capped plea that the legislature has mandated by statute for the District Court system. *See* M.G.L. ch. 278 §18. Since the Committee voted not to extend this practice to the Superior Court, the recommended subdivision has been changed to specify that it applies only in the District Court.

The subdivision does not address the question of how many times a defendant may tender a defense capped plea. This issue is not answered in the District Court Rules of Criminal Procedure and is a matter on which different District Courts and District Court judges differ. The Committee believes that individual judges should be free to formulate their own policy on this issue as the needs of their particular courts dictate.

12(c)(3)

The provision allowing defense counsel to conduct the colloquy with the defendant has been eliminated. The Committee saw no merit in such a procedure and noted that this practice has not been followed for some time.

12(c)(3)(A)

This amendment adds language to make it applicable to cases where the defendant has tendered an admission to sufficient facts to warrant a finding of guilty.

This subdivision has also been amended to require an additional warning of rights be given to the defendant. The three rights originally included in the rule were those mandated by the federal constitution, as held by Boykin v. Alabama, 395 U.S. 238 (1969). The amendment adds a warning about the right to be presumed innocent until proved guilty beyond a reasonable doubt. Though not constitutionally required, it is sound practice to include it.

12(c)(3)(B)

The Committee made two additions to this subsection, requiring a defendant to receive notice of the consequences of a guilty plea. The first is relevant for the small number of sex offenses which new legislation makes subject to the possibility of community parole supervision for life. This provision is similar to special parole terms in federal law, and the Committee has followed the example of federal courts in requiring its inclusion in a guilty plea colloquy.

The second addition requires a defendant who is pleading guilty to a relevant sex offense to receive notice of the possibility that the defendant may have to register as a sex offender. Courts in other jurisdictions mandate such a warning, and the newest Massachusetts legislation on the subject requires a court which accepts a plea for a sex offense to inform the defendant that the plea may result in the defendant's being subject to the provisions of the sex offender registration statute.

The Reporter's Notes to this subsection will make clear that the requirement of informing a defendant of the mandatory minimum sentence applies only when probation is not a sentencing option.

12(c)(3)(C)

This subdivision has been added to include the fact that the defendant's plea or admission may have immigration consequences if the defendant is not a citizen of the United States. By statute, the court may not accept a plea of guilty or nolo contendere without giving a warning of these consequences. The statute requires a warning of the consequences of a conviction. This is somewhat misleading since the immigration laws treat admissions to sufficient facts that result in a continuance without a finding as the equivalent of a conviction. By warning the defendant that a plea or admission can have adverse immigration consequences, the court necessarily conveys not only the message about the effect of an ensuing conviction but also alerts the defendant to the possibility of adverse consequences from the plea or admission itself.

12(c)(4) and 12(c)(5)

These subdivisions have been amended to reflect the fact that the colloquy procedure now applies to admissions as well as guilty pleas.

12(c)(6)

This subdivision has been amended to reflect the defense capped plea provision applicable to District Courts, added in subdivision (c)(2)(B).

12(d)

The Committee deleted this section on the ground that the procedure it described was unnecessary and had not been observed in practice since the Rule was adopted in 1979. Individual judges still retain the discretion to refuse to entertain a prosecutor's recommendation that was the basis of a plea that the defendant has withdrawn.

12(f)

This subdivision has been amended to include admissions to sufficient facts among the category of actions by the defendant that are not admissible if later withdrawn. Defendants in District Court have a right to withdraw an admission if the judge does not accept a defense capped plea. There is no reason to treat this admission differently for evidentiary purposes than a guilty plea that the defendant withdraws because the judge will exceed a prosecutor's sentence recommendation.

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Major issues raised in public comments and minority report, and Committee responses

The Committee considered comments from two District Court judges who recommended that the Rule prohibit defendants in District Court from offering a defense capped plea in the trial session. The Committee decided to maintain its original decision not to address this issue, because it felt that individual District Court judges should be free to tailor their policy on this issue to the needs of their individual courts.

The April, 2003 Minority report raises a series of issues regarding rule 12.[11] The majority's view with regard to these issues is as follows:

A. Additional Warnings

The Committee believes that it is an appropriate function for the Rules of Criminal Procedure to go beyond the minimal requirements mandated by the Constitution or statute and require judges to include in guilty plea colloquies additional information that will enhance the integrity of the process. The existing version of Rule 12(c)(3) does this already in some respects, for example in requiring notice of the maximum sentence possible from consecutive sentences. In fact, when Rule 12 was originally adopted in 1979, the Reporter's Notes to subsection (c)(3)(B) specifically called attention to the fact that although prior law did not require a defendant to be informed that he was subject to treatment as a sexually dangerous person, the new rule would effect a change.

Presumption of Innocence and Proof Beyond a Reasonable Doubt [12(c)(3)(A)] -- The Committee agrees with the minority report that a warning about the right to be presumed innocent until proved guilty beyond a reasonable doubt is not constitutionally required, but recommends its inclusion in Rule 12 on the ground that it is sound practice to make it part of the colloquy. The Court has recommended its use in cases where the defendant is willing to plead guilty but does not acknowledge all of the elements of the factual basis. *See* Commonwealth v. Earl, 393 Mass. 738, 742 (1985). A number of other states require its use in guilty plea colloquies as a matter of court rule.[12] **The**

[11] Committee member Pamela Hunt received leave from the most recent Committee meeting to submit a minority report on this rule (hereinafter "2003 Minority Report"), and the Reporters were directed to include a response to it in this submission.

[12] *Delaware* : the judge must advise the defendant that he has "the right to be presumed innocent until proven guilty beyond a reasonable doubt" Del. Fam. Ct. Crim. R. 11(d) (1995)

Maine : The judge must ensure that defendants pleading guilty to a class C or higher offense understand that they are relinquishing "the right to be considered innocent until proven guilty by the state beyond a reasonable doubt." Me. Rules Crim. Pro., Rule 11 (c)(2)(A) (1995).

Michigan: Michigan has a detailed rule concerning the acceptance of guilty pleas which requires the judge to tell the defendant that, if his plea is accepted, he gives up various rights, including "the right . . . (iii) to be presumed innocent until proved guilty; [and] (iv) to have the prosecutor prove beyond a reasonable doubt that he is guilty" Mich. Gen. Ct. Rule 785.7 (1) (c) (1984). See Guilty Plea Cases, 395 Mich. 96, 119 (1975), *cert. denied sub nom*. Sanders v. Michigan, 429 U.S. 1108 (1977), discussing a predecessor rule to the same general effect.

Minnesota: In felony cases and gross misdemeanors, the judge must ask the defendant whether he understands "that if [he] wishes to plead not guilty . . . [he] will be presumed innocent until guilt is proved beyond a reasonable doubt." Minn. R. Crim. Pro., Rule 15.01 subdv. 7 (1995).

Ohio: In Ohio, a judge is instructed by rule not to accept a plea of guilty in a felony case without "[i]nforming [the defendant] and determining that he understands that by his plea he is waiving his rights . .

Committee believes that the inclusion of this information will enhance the fundamental fairness of the guilty plea process.

Community Parole Supervision for Life [12(c)(3)(B)] -- The Massachusetts provision for community parole supervision for life is similar to the special parole provisions that used to exist in federal criminal law. Under the sentencing scheme that existed prior to the adoption of the federal sentencing guidelines, defendants convicted of certain offenses were sentenced to a term of special parole in addition to their regular sentence. Special parole took effect at the expiration of the ordinary parole term that was keyed to the sentence the defendant received. If a federal defendant violated the terms of the special parole, he could be imprisoned beyond the term of his original sentence. In 1982, the federal rules were amended to require a judge to give notice to a defendant of the possibility of special parole.[13] **Even prior to the amendment, federal courts viewed special parole as part of the maximum penalty which defendants faced, and federal courts routinely required its inclusion in guilty plea colloquies.**[14] **The Committee believes that defendants who tender guilty pleas to crimes which may subject them to similar treatment under Massachusetts law should not waive their right to a trial without being aware of this possibility.**

Sex Offender Registration -- As the minority report recognizes, there is a statutory mandate that defendants receive notice of the possibility of sex offender registration prior to entering a guilty plea. The gist of the minority's objection to the inclusion of this provision in Rule 12 seems to be a concern that putting this requirement in the Rules of Criminal Procedure will mean that any failure to comply will result in the automatic invalidation of the plea. In the particular context of Rule 12, case law establishes that not

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. to require the state to prove his guilt beyond a reasonable doubt at a trial . . . ." Ohio R. Crim. P. 11 (C) (2) (c) (1994).

Pennsylvania: A reporter's comment to Rule 319 of the Pennsylvania Rules of Criminal Procedure, concerning pleas and plea agreements, indicates certain essential questions a judge should ask, including "Does the defendant understand that he is presumed innocent until he is found guilty?" Rules Committee Comments to Pa. R. Crim. P. 319, Pa. Cons. Stat. Ann., Rules of Criminal Procedure at 298 (Purdon, Supp. 1984).

[13] Prior to 2002, the Federal Rules of Criminal Procedure, Rule 11(c)(1) required the judge to give the defendant notice of:

> the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense

[14] *See e.g.* Moore v. United States, 592 F.2d 753 (4th Cir. 1979); United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978); Richardson v. United States, 577 F.2d 447 (8th Cir. 1978); United States v. Del Prete, 567 F.2d 928 (9th Cir. 1978); United States v. Watson, 548 F.2d 1058 (D.C. Cir. 1977); United States v. Crusco, 536 F.2d 21 (2d Cir. 1976); United States v. Yazbeck, 524 F.2d 641 (1st Cir. 1975); United States v. Wolak, 510 F.2d 164 (6th Cir. 1975). In United States v. Timmreck, 441 U.S. 780 (1979), 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

every rule violation invalidates a guilty plea. *See, e.g.,* Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572 (2001):

> We will not assume that the defendant's plea was involuntary and unknowing and say as a matter of law that justice was not done simply because the record reflects noncompliance with rule 12. Commonwealth v. Nolan, 16 Mass. App. Ct. 994, 995, 454 N.E.2d 1280 (1983). While compliance with the procedures set out in rule 12(c) is mandatory, adherence to or departure from them is but one factor to be considered in resolving whether a plea was knowingly and voluntarily made. Commonwealth v. Johnson, 11 Mass. App. Ct. 835, 841, 420 N.E.2d 34 (1981). Each case must be analyzed individually to determine whether compliance with rule 12 would have made a difference in the decision of the defendant to plead guilty. Commonwealth v. Russell, 37 Mass. App. Ct. 152, 157, 638 N.E.2d 37 (1994), *cert. denied*, 513 U.S. 1094 (1995), *citing* Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 499, 475 N.E.2d 763 (1985). The defendant has the burden of showing any special circumstances relating to his plea that demonstrate that denial of his motion to withdraw his plea would work an injustice. *See* Commonwealth v. Hason, 27 Mass. App. Ct. at 844. A judge should allow a postsentence motion to withdraw a guilty plea only if the defendant comes forward with a credible reason for withdrawing the plea that outweighs the risk of prejudice to the Commonwealth.

As a general matter, the Rules do not address the issue of the consequence for the validity of a conviction of a failure to observe one its mandates. In this particular case, however, the Reporter's Notes will call attention to the provision in G.L. c. 6, §178E(d) providing that failure to provide this information shall not be grounds to vacate or invalidate the plea. The Committee believes that this reference is sufficient to meet the concerns of the minority report.

Sexually Dangerous Person Commitment, Consecutive Sentences, Mandatory Minimum Sentences, Additional Punishment Based on Subsequent Offense Provisions-- The minority report takes issue with the Committee's decision to maintain as part of the guilty plea colloquy, information about:

(i) the possibility of commitment as a sexually dangerous person;

(ii) the possible maximum sentence a defendant faces if all the potential sentences run consecutively;

(iii) the mandatory minimum sentence of incarceration to which a defendant is subject; and,

(iv) the additional punishment the defendant faces as a result of having prior convictions which trigger subsequent offender treatment.

All of these provisions have been a part of Rule 12 since its adoption in 1979. The Committee is aware of no problems that have arisen in all that time from their inclusion in the Rule. Moreover, the Committee believes that this information is so

important to a defendant contemplating a guilty plea that basic fairness requires its inclusion in the colloquy.

Immigration Consequences [12(c)(3)(C)] -- As the minority report recognizes, there is a statutory mandate that defendants receive notice of the possible immigration consequences prior to entering a guilty plea. The minority report also recognizes that it is better practice for judges to provide this notice to defendants who admit to sufficient facts even though the statute does not reach those cases. As before, the gist of the minority's objection to the inclusion of this provision in Rule 12 seems to be a concern that putting this requirement in the Rules of Criminal Procedure will mean that any failure to comply will result in the automatic invalidation of the plea. As noted earlier, however, a defendant is not entitled to a new trial simply by establishing that the trial judge did not follow all of the dictates of Rule 12. *See Rodriguez*, 52 Mass. App. Ct. 572, *supra.*

The Committee believes it is sufficient for the Reporter's Notes to call attention to the Court's language in Commonwealth v. Villalobos, 437 Mass. 797, 805-06 (2002) on this issue:

> While . . . a defendant [who entered an admission to sufficient facts rather than a guilty plea] could not invoke the automatic remedy provided by the statute, we cannot rule out the possibility that such false information might detract from the knowing and voluntary nature of a defendant's admission to sufficient facts. Judges are not required to provide a defendant with advice concerning the application of immigration law to that defendant's particular situation. However, where an admission to sufficient facts is the predicate to a continuance without a finding, we recommend that judges provide a slight amplification to the statutory warnings to avoid any potential for misleading such a defendant.

B. Defendant's Request for Disposition in District Court [12(c)(2)(B)]

The Committee believes that the language it used to incorporate into Rule 12(c)(2)(B) the statutorily mandated defense capped plea provision in District Courts is consistent with G.L. c. 278 § 18 and that the problems the minority report foresees are the consequence of a strained interpretation of the proposed amendment. Any confusion about the meaning of this provision should be obviated by the appearance in the Reporter's Notes to this subsection of the precise language of the statute. As to the application of this provision to *nolo contendere* pleas, the Committee believes this issue to be of only marginal practical importance given the existence of admissions to sufficient facts in District Court practice.

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PROPOSED RULE 12

Rule 12. PLEAS AND WITHDRAWALS OF PLEAS

(a) Entry of Pleas.

(1) Pleas Which may be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts. The judge shall not accept such a plea or admission without first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission.

(b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and defense counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment which may also include the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant's plea, he or she shall inform the judge thereof prior to the tender of the plea.

(c) Guilty Plea Procedure. After being informed that the defendant intends to plead guilty or nolo contendere:

(1) Inquiry. The judge shall inquire of the defendant or defense counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.

(2) Recommendation as to Sentence or Disposition.

(A) Contingent Pleas. If there were sentence recommendations contingent upon the tender of the plea, the judge shall inform the defendant that the court will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw the plea.

(B) Disposition Requested by Defendant. In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.

(3) Notice of Consequences of Plea. The judge shall inform the defendant on the record, in open court:

(A) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, including that possible from consecutive sentences and where appropriate, the possibility of community parole supervision for life; of any different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable; where applicable, that the defendant may be required to register as a sex offender; and of the mandatory minimum sentence, if any, on the charge;

(C) that if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(4) Tender of Plea. The defendant's plea or admission shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea or admission and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgement of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state the court's acceptance or rejection of the plea or admission.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge may proceed with sentencing.

(6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that the court will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule, an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), or a request for disposition in a District Court by the defendant under subdivision (c) (2) (B), after having informed the defendant as provided in subdivision (c)(2) that the court would not do so, the judge shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that the judge intends to exceed the terms of the plea recommendation or request for disposition and shall afford the defendant the opportunity to then withdraw the plea or admission. The judge may indicate to the parties what sentence the judge would impose.

(d) Deleted

(e) Availability of Criminal Record and Presentence Report. The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere, the presentence report as described in subdivision (d)(2) of Rule 28 shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissability of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo

contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

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PROPOSED RULE 12 – SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

Rule 12. PLEAS AND WITHDRAWALS OF PLEAS

~~(Applicable to District Court and Superior Court)~~

(a) Entry of Pleas.

(1) Pleas Which may be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which ~~he~~ **the defendant** has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant ~~himself~~ **personally** except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded ~~where facilities for recording are available~~. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

~~(3)~~ (2) Admission to Sufficient Facts. In a District Court, ~~jury-waived session~~ a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

~~(2)~~ (3) Acceptance of Plea of Guilty, **a Plea of** ~~or~~ Nolo Contendere**, or an Admission to Sufficient Facts.** A judge may refuse to accept a plea of guilty or **a plea of** nolo contendere **or an admission to sufficient facts**. ~~He~~ **The judge** shall not accept such a plea **or admission** without first determining that ~~the plea~~ **it** is made voluntarily with an understanding of the nature of the charge and the consequences of the plea **or admission**.

(b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and ~~his~~ **defense** counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment **which may also include** ~~with~~ the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant's plea, ~~he~~ **he or she** shall inform the judge thereof prior to the tender of the plea.

(c) Guilty Plea Procedure. After being informed that the defendant intends to plead guilty or nolo contendere:

(1) Inquiry. The judge shall inquire of the defendant or ~~his~~ **defense** counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.

(2) Recommendation as to Sentence **or Disposition**.

(A) Contingent Pleas. If there were sentence recommendations contingent upon the tender of the plea, the judge shall inform the defendant that ~~he~~ **the court** will

not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw ~~his~~ **the** plea.

(B) Disposition Requested by Defendant. In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.

(3) Notice of Consequences of Plea. The judge shall inform the defendant~~, or permit defense counsel under the direction of the judge to inform the defendant,~~ on the record, in open court:

(A) that by ~~his~~ **a** plea of guilty or nolo contendere**, or an admission to sufficient facts,** ~~he~~ **the defendant** waives ~~his~~ **the** right to trial with or without a jury, ~~his~~ **the** right to confrontation of witnesses, **the right to be presumed innocent until proved guilty beyond a reasonable doubt,** and ~~his~~ **the** privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, including that possible from consecutive sentences **and where appropriate, the possibility of community parole supervision for life**; of any different or additional punishment based upon ~~second~~ **subsequent** offense or sexually dangerous persons provisions of the General Laws, if applicable; **where applicable, that the defendant may be required to register as a sex offender;** and of the mandatory minimum sentence, if any, on the charge;

(C) that if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(4) Tender of Plea. The defendant's plea **or admission** shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea **or admission** and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless ~~he~~ **the judge** is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgement of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state ~~his~~ **the court's** acceptance or rejection of the plea **or admission**.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere **or an admission**, the judge may proceed with sentencing.

(6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that ~~he~~ **the court** will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule**,** ~~or~~ an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), **or a request for disposition in a District Court by the defendant under subdivision (c) (2) (B),** after having informed the defendant as provided in subdivision (c)(2) that ~~he~~ **the court** would not do so, ~~he~~ **the judge** shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that ~~he~~ **the judge** intends to exceed the terms of the plea recommendation **or request for disposition** and shall afford the defendant the opportunity to then withdraw ~~his~~ **the** plea **or admission**. The judge may indicate to the parties what sentence ~~he~~ **the judge** would impose.

(d) **Deleted** ~~Withdrawal of Plea.~~

~~If a defendant withdraws a plea of guilty or nolo contendere the case may be advanced for trial. The fact that an agreed recommendation was tendered and rejected, but not the terms thereof, shall be entered on the record. If the defendant subsequently tenders a plea of guilty or nolo contendere, no recommendation as to disposition which is based upon the prior plea negotiations shall be offered by the prosecutor, but the prosecutor may address the court as to the nature and seriousness of the offense charged and may propose a disposition and the judge may permit the defendant or his counsel to propose a disposition.~~

(e) Availability of Criminal Record and Presentence Report. The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere, the presentence report as described in subdivision (d)(2) of Rule 28 shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissability of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, ~~later withdrawn~~, or a plea of nolo contendere, **or an admission,** or of an offer to plead guilty or nolo contendere **or an admission** to the crime charged or any other crime, **later withdrawn** or statements made in connection with, and relevant to, any of the foregoing pleas or

offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere**, or an admission** or an offer to plead guilty or nolo contendere **or an admission** to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel**, if any**.

RULE 13 -- PRETRIAL MOTIONS

Summary and Explanation of Revisions

Existing Rule 13 governs the form, filing and hearing of pretrial motions. The formal requirements concerning written motions, affidavits, supporting memoranda, service and notice are retained in all respects. So too are the specific provisions in 13(b) and 13(c) concerning bills of particulars and motions to dismiss respectively.

As to *filing deadlines*, existing Rule 13 requires revision in two respects. First, 13(a) contains a provision for refiling of motions at the de novo jury trial, which no longer exists. We have simply removed that language. Second, the deadlines for filing and marking up non-discovery pretrial motions in existing Rule 13(d) conflict with the timelines established by the single trial legislation. According to the single trial legislation, MGL Ch. 278 Sec. 18, pretrial motions are to be filed within 21 days of the defendant's decision whether to waive a jury.[15] We have rewritten 13(d)(2) to reflect the district court legislation, and in the interests of both uniformity and efficiency have applied the same timeline to District Court, BMC and Superior Court filings. However, in the single trial legislation the event that commences the 21-day deadline -- the jury waiver decision -- seems to us an awkward event on which to hang a court calendar, and also may occur in Superior Court at a different time than that contemplated by the district court legislation. So we have instead required non-discovery motions to be filed "before the assignment of a trial date . . . or within 21 days thereafter, unless the court permits later filing for good cause shown."[16] In District Court this will be the same date as the

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[15] Unfortunately Dist./Mun. Court Rule 6 did not fully conform to this legislative mandate, providing instead one deadline for filing non-discovery pretrial motions in the District Court and a different one for filing in the BMC. In District Court, the clock begins ticking at the time of the defendant's jury election or waiver, as the legislature intended. But Dist./Mun. Court Rule 6(b) provides that the deadline for filing non-discovery motions in the BMC is 21 days *from the filing of the pretrial conference report* for motions filed in the BMC.

We have adopted the legislative/District Court timeline across the board, for several reasons. (However, as noted above the Committee decided that rather than treat the decision on jury waiver as the triggering event, it would have the clock run from the "assignment of a trial date." This will be the same date as the jury election or waiver under Rules 11(b) and (c), but is connected in a more obvious and memorable way to the deadline for filing motions.) First, the BMC deadline abridges a procedural right afforded by the legislature. Second, since the pretrial conference report will often be filed before discovery has been delivered, the BMC deadline for filing pretrial motions could expire before a party has obtained the discovery she needs to ascertain what pretrial motions are appropriate. Third, as noted previously, we believe strongly that the Massachusetts Rules of Criminal Procedure should not simply preserve differences between the BMC and District Court procedures, at least when not based on differing circumstances in the two courts. Our rules should be uniform, and not afford procedural rights and duties based on geographical accident.

Dist./Mun. Ct. Rule 6(a) also contains a good deal of language devoted to *where* one files non-discovery motions. It provides that motions submitted after the jury waiver decision should be filed in the session where the trial will be heard, *unless* the presiding justice has ordered the primary session to hear such motions. This seems to us to be the kind of detail which should be left to District Court rules, or justices, to decide. Therefore we have not included any provision dealing with which District Court session should receive and/or hear non-discovery pretrial motions.

[16] Rules 11(b) and (c) require the court to set a trial date or trial assignment date following the pretrial

jury election (as mandated by the single trial legislation), and in Superior Court it seems a more appropriate date than the jury election date in the event the two dates differ.

Under Rule 13(d)(1), discovery motions must be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. That provision also specifies two non-exhaustive circumstances which shall be deemed to constitute good cause. In any event, with the institution of automatic and comprehensive discovery without motion under Rule 14, motions for discover should be unnecessary in most cases.

Rule 13(e) governs the scheduling of a hearing on pretrial motions. The Committee considered and rejected instituting a motions session, or requiring the scheduling of an additional date dedicated to the hearing of pretrial motions. The merit to such an innovation is that it would help clarify many questions that have plagued counsel historically: for example, can a party mark-up a motion for hearing, and how? Should motions be left to the trial date, leaving the parties uncertain whether a trial will occur? Nevertheless, the Committee decided against instituting a mandatory motions session or hearing date. The proposal instead retains in substance existing Rule 13's provision governing motions hearings in jury sessions -- that within 7 days of filing the clerk should schedule a hearing -- but (1) applies it to all sessions, and (2) modifies the triggering date by directing that "within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a hearing date." The Committee favored this resolution because it allows individual courts to decide whether non-discovery motions should be heard at pretrial conference, should be scheduled to a separate date, or should be transmitted to the trial session -- as does the Dist./Mun. Ct. Rules.

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Major issues raised in public comments and minority reports, and Committee responses

(1) A Lawyer's Weekly editorial on the rules proposals, treated as a comment by the Committee, suggested that a provision in the current rule that was deleted be retained. Under current Rule 13(d)(1)(A)(ii), "If the parties have agreed to a *mutually convenient time* for the hearing of a pretrial motion, … the clerk shall mark up the motion for hearing at that time unless the judge otherwise orders." The Committee agreed that retention of this provision could enhance the efficiency and convenience of motions practice, and modified proposed Rule 13(e)(3) to include the substance of that suggestion.

(2) One comment objected to the deadline for defense discovery motions on grounds that defense counsel may not know prior to the pretrial hearing, the presumptive deadline, what discovery he or she requires. The Committee unanimously declined to revise the rule. Rule 13(d) requires defense discovery motions to be filed prior to the conclusion of the pretrial hearing, but allows consideration of motions filed thereafter if "the discovery sought could not reasonably have been requested or obtained prior to the

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hearing or compliance hearing respectively.

conclusion of the pretrial hearing," 13(d)(1)(A), or if "other good cause exists," 13(d)(1)(C). This should be fully sufficient to allow previously unforeseen motions by either party, while still promoting expeditious resolution of the discovery phase through the presumptive deadline.

(3) The Plymouth D.A.'s office objected to the singling out of the Commonwealth in 13(d)(1)(B), stating the deadlines should be the same for both parties. However, 13(d)(1)(B) provides the Commonwealth with an additional ground for filing discovery motions beyond the presumptive pretrial hearing deadline: it may do so if "the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing." This special provision is necessary because under the rules, the Commonwealth must fulfill its discovery obligations in order to receive discovery; under the Supreme Court ruling in Wardius v. Oregon, 412 US 470 (1973), it violates due process for the prosecution to receive discovery without having provided the equivalent categories to the defense. If the Commonwealth has been unable to provide discovery prior to the pretrial hearing for good reason, it should not be prejudiced by having its reciprocal discovery rights foreclosed. Provision 13(d)(1)(ii) is necessary to preserve the Commonwealths discovery rights in such a situation. The Committee unanimously declined to revise this provision.

(4) The Lawyer's Weekly comment suggested that the rule include a provision permitting *ex parte* motions to fund indigent expenses. The Committee decided such a provision need not be inserted into the rule, but instructed the Reporters to include mention in the Reporter's Notes that ex parte proceedings can be invoked for defense motions seeking funds for indigent defense expenses and for motions to withdraw representation.

(5) The 2003 Hunt Minority Report at 21 states that Rule 13(d)(2) requires nondiscovery motions to be filed no later than 21 days after the assignment of a trial date, and argues that this violates the single trial legislation, M.G.L. c. 278 sec. 18. That legislation provides for a filing deadline of 21 days after the election or waiver of a jury trial. As noted above (in the second paragraph regarding Rule 13, supra), the Committee decided that the waiver decision was an awkward time from which to run the motion clock, and that "assignment of the trial date," which must occur on the same day in district court as the waiver pursuant to the legislation (and proposed Rule 11), would provide the same deadline yet be a more obviously relevant and memorable trigger for the motion clock. Although it is theoretically possible for motions to be heard on the trial day, Rule 13(e)(3) provides that within seven days of filing, the clerk should schedule the motion for hearing, and also provides a method for the parties to agree to a mutually convenient time for hearing.

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PROPOSED RULE 13

Rule 13. PRETRIAL MOTIONS

(a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the

approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

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PROPOSED RULE 13 – SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

Rule 13. PRETRIAL MOTIONS

~~(Applicable to District and Superior Court)~~

(a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule. ~~Notwithstanding the foregoing, the failure of the defendant to file pretrial motions in a District Court jury-waived session, or if filed, the denial thereof, shall not constitute a waiver of the right to file such motions upon an appeal to a District Court jury session.~~

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he **or she** may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the ~~judge~~ **court** upon ~~his~~ **its** own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing~~; Hearing on Motions.~~

~~(1) District Court.~~

~~(A) No Conference Ordered.~~

~~(i) Filing. A pretrial motion shall be filed and marked up for hearing not less than five days prior to trial or within such other time as the court may order. The judge for cause shown may entertain a pretrial motion at any time before trial.~~

~~(ii) Scheduling Hearings on Motions. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, the moving party may request that the clerk mark up the motion for hearing at that time. If so requested, the clerk shall mark up the motion for hearing at that time unless the judge otherwise orders.~~

~~(B) Conference Ordered. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. A pretrial motion shall be filed and heard at the time set by the judge pursuant to Rule 11(b)(2) for the filing of the conference report or at such other time as the judge may allow.~~

~~(C) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.~~

~~(2) Superior Court; Jury Sessions in District Court.~~

~~(A) Filing; Hearing on Motions.~~ Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court. ~~A pretrial motion shall be filed within seven days after the date set for the filing of the pretrial conference report pursuant to Rule 11(a)(2) or at such other time as the judge or special magistrate may allow. Within seven days after a pretrial motion is filed, the clerk shall schedule a hearing thereon, but the judge or special magistrate for cause shown may entertain such motion at any time before trial.~~

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion~~, at which evidence may be offered in support of or opposition to the motion~~. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

~~(B) Notice. The moving party shall give reasonable notice to all interested persons of the time set for hearing a pretrial motion.~~

RULE 14 -- PRETRIAL DISCOVERY

Summary and Explanation of Revisions

OVERVIEW

Almost all significant changes to discovery practice under the rules are contained in Rule 14(a), governing discovery generally. Many of these changes are required, at least as applied to District Court, by the single trial legislation that included much broader discovery provisions than Rule 14. Other significant revisions are based on our strong conviction that full, automatic, and even-handed discovery to both sides will improve both the administration and delivery of justice.

Proposed Rule 14(a) substantially reduces reliance on motions and argument in areas where discovery is commonly afforded in practice. It substitutes a system of automatic discovery of such items to both sides; but it also insures that all parties have a full opportunity to argue against discovery of any of these items where special circumstances in the case warrant divergence from these presumptive procedures. We describe those changes in detail following.

There are a few minor changes to the rest of Rule 14. A revision to Rule 14(d) adds "written statement" to the definition of "statement." Rule 14(e), timing requirements for discovery motions, is deleted because Proposed Rule 13(d) governs pretrial motion deadlines, including discovery motions. Rules 14(b) (governing notice of certain specific defenses -- alibi, lack of criminal responsibility, licence, etc.) and 14(c) (governing sanctions) are left unchanged except for gender neutral language.

INSTITUTION OF AUTOMATIC, BROAD DISCOVERY TO BOTH SIDES

1. Automatic discovery: Both defense and prosecutorial discovery of commonly discoverable items are made automatic -- without the necessity of filing motions. The items subject to automatic discovery are enumerated in subpars. (a)(1)(A)(i)-(viii). However, if a party believes good cause exists for non-discovery of an item listed as automatic discovery, it may resist disclosure pursuant to Proposed Rule 14(a)(1)(C), providing for a *mandatory stay of discovery* of any item that the obligated party believes should not be disclosed, pending resolution by the court.

We propose instituting automatic discovery for two reasons. First, requiring motions and hearings to obtain basic discovery can unnecessarily delay the case, and absorb court and counsel time and expense. (This problem is compounded in cases subject to the thirty day rule.) By providing for broad mandatory discovery to the defense and prosecution without motion, proposed Rule 14 manages court events more efficiently by expediting the ordinary case while maintaining all parties' rights to seek an exercise of judicial discretion in the extraordinary case.

Second, automatic discovery early in the case provides the defense with notice of the Commonwealth's case prior to plea negotiations or the filing of other pretrial motions. Existing Rules 13 and 14 may require counsel to submit pretrial motions (including motions to suppress) before receiving discovery -- an impractical procedure, particularly since most motions to suppress require counsel to submit affidavits and memoranda that detail the grounds. Such grounds may only be revealed through discovery, which should come first. Nor should counsel be expected to adequately discuss the possibility of a plea or admission without having previously reviewed discovery. Our revisions to Rules 13 and 14 would effectuate the purposes of the pretrial conference system by requiring defense discovery before the conference and prosecutorial discovery before the pretrial hearing in the usual case.

In theory but apparently not in practice, automatic discovery is already mandated in Superior Court by Standing Order 2-86. In District Court, however, automatic discovery is now the rule, both legally and in practice. It is required by the District Court/BMC Rule 3(c), which provides for an automatic discovery order at arraignment.[17] After debate on whether the Criminal Rules should also require an automatic discovery order, the Standing Advisory Committee voted to have the obligation stem directly from the rule itself, with the rule's obligations having all the force and effect of a court order.

2. Expanded scope of "mandatory discovery" to conform with legislative requirements. Existing Rule 14(a) classifies a large number of items routinely turned over as "discretionary discovery," to be ordered within the sound discretion of the trial judge. But most of these items are no longer "discretionary" in District Court, since the 1993 legislation abolishing trial de novo in the District Court. Under provisions in MGL c. 218 s. 26A, such discovery was made mandatory in District Court.[18] The legislative requirement has now been included in the Dist./Mun. Ct. Rule 3. We have incorporated the legislative requirement as effectuated by the Dist./Mun. Ct. Rules into section 14(a)(1)(A)(I)-(viii), enumerating the items subject to mandatory discovery.

The list of items now included as mandatory discovery also reflects caselaw in some cases. We have appended explanations as to these individual modifications as footnotes in the draft rule itself. These explanations can be found in the footnotes to particular provisions in (a)(1)(A), on the draft of proposed Rule 14 that is marked up to show all modifications.

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[17] Under BMC/Dist Ct rule 3(a), the defendant's criminal record and police reports must be *given* at arraignment, and under Rule 3(c) an order for other discovery pursuant to c. 218 sec. 26A must be *issued* at arraignment.

[18] Sec. 26A provides that a District Court judge shall, upon the defendant's motion or the court's own motion, "issue an order of discovery requiring any information to which the defendant is entitled and also requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody or control of the prosecutor or persons under his direction and control. Upon motion of the defendant the judge shall order the production by the Commonwealth of the names and addresses of the prospective witnesses and the production by the Probation Dept. of the record of prior convictions of any such witnesses."

One item proposed for inclusion on the list of mandatory discovery garnered a split vote from the Committee. This is item (a)(1)(A)(ix), providing mandatory discovery whether wire or oral communications of specified types have been intercepted, and whether a government informant whose identity and/or location is claimed to be privileged from disclosure. The Committee simply conveys the proposal to the Supreme Judicial Court with the information that it was evenly divided whether to include this language in the rule.

3. Extension to Superior Courts: In the proposed rule, we have extended the single trial legislation's discovery provisions to the Superior Court as well. The Committee sees no principled reason why jury trials in District Court and Superior Court should have different discovery rules. Incorporating two different discovery systems in Rule 14 would undermine the legitimacy of each to some degree, and lead to unnecessary confusion and contradictory case law. We have therefore applied the new requirements to all the trial courts by redrawing the definitions of "mandatory" and "discretionary" discovery in the rule. It is worth noting that although this revision alters existing Rule 14 significantly, it does not so substantially change the practice which is *supposed* to occur in Superior Court under Sup. Ct. Standing Order 2-86 (which requires the prosecutor to provide a "discovery package" to defense counsel at arraignment[19]), except by providing the prosecution with additional time (until the pretrial conference) to deliver its existing items of discovery.

4. Full and mandatory reciprocal discovery to the prosecution: We have revised the reciprocal discovery provision to make discovery to the prosecution mandatory, subject to existing constitutional constraints. The major constraints are found in Wardius v Oregon, 412 U.S. 470 (1973), and Williams v. Florida, 399 U.S. 78 (1970). Under Williams, the Fifth Amendment privilege limits prosecutorial discovery to evidence the defendant intends to introduce. This "intent" limitation was contained in the old rule and is retained here. Under Wardius, it is a violation of due process for the prosecution to receive categories of discovery which have not been afforded to the defense. To assure against such reversible error, our Rule provides for defense discovery to take place first (as does Fed. R. Crim P. 16(b)), and upon certification by the Commonwealth that such discovery is complete, reciprocal discovery must be delivered to the Commonwealth within seven days.

5. Scope of prosecutor's duty: Existing Rule 14 has been superceded by substantial caselaw describing the scope of the prosecutor's obligations to obtain material from police and others. The silence of Rule 14 on this issue was noted in the *Bacigalupo v. Commonwealth* single justice opinion, SJ-96-0300, in which Justice Wilkins suggested that the Standing Advisory Committee might consider whether it would be helpful "to have a rule that more fully describes the scope of a prosecutor's duty of inquiry." A

[19] According to Sup. Ct. Standing Order 2-86, Part II, the discovery package which is to be provided to the defendant at arraignment is to include: copies of all discoverable police reports, copies of written statements of the defendant and witnesses available to the prosecutor, copies of scientific reports and other documentary evidence available to the prosecutor, an opportunity to examine photographs and real evidence, and the Grand Jury minutes.

subcomittee of the Standing Advisory Committee considered the issue and concluded, in an 11/5/96 memo, that "there is no duty on the prosecutor to investigate specifically for exculpatory evidence...The subcomittee majority does not believe that a new duty to investigate specifically for exculpatory evidence should be imposed by a rule of criminal procedure." However, the Committee also believes that the question of the extent of the prosecutor's duty to obtain and convey evidence should be more fully specified in the rule.

As revised, Rule 14(a)(1)(A) describes the prosecution's mandatory discovery duties as extending only to ascertaining and delivering material it and its agents already possess or control. The language adopted is not intended to change existing caselaw but reflects it. We have essentially adopted the language of existing caselaw, such as *Commonwealth v. Daye*, 411 Mass. 719 (1992), which holds that a prosecutor "cannot be said to suppress that which is not in his possession or subject to his control," and further describes the "prosecuting attorney's obligations [as extending] to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office."[20] *Daye* is joined by numerous other cases, all of which describe the prosecutorial duty of disclosure as extending to all discoverable material existing in its own files and in the files of others who have participated with them in the prosecution.[21] The latter officials are usually police, but includes others assisting in the prosecution. Thus in *Com. v. Martin*, 427 Mass. 816, 823-24 (1998), the SJC reversed a conviction because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth crime lab.[22] It is clear, however, that the scope of the prosecutor's duty of disclosure

[20] Daye at 734, citing Commonwealth v. St. Germain, 381 Mass. 256, 261-262 n. 8, 408 N.E.2d 1358 (1980) and the A.B.A. Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial 2.1(d) (Approved Draft 1970).]

[21] Similarly, Commonwealth v. Wanis, 426 Mass. 629 (1998), describes present Rule 14 as reaching "police officers who are participants in the investigation and presentation of the case and police officers who regularly report to the prosecutor or did so in reference to a given case". It notes, however, that the Constitution requires that exculpatory evidence in the possession of *other* law enforcement or government agencies must also be given to the defendant; and Wanis further held that "no special showing of relevance or need is required for the production of statements of percipient witnesses" in the possession of such an agency. Because existing Rule 14 has no provision reaching such statements, Wanis held that a judge should normally issue a subpoena -- in that case, to the Internal Affairs Division -- to obtain such evidence for the defendant.

See also Kyles v. Whitley, 514 US 419 (1995)(prosecutor has duty to learn of exculpatory evidence regardless of any failure by the police to bring favorable evidence to the prosecutor's attention); Com. v. Baldwin, 385 Mass. 165, 177 n. 12 (evidence in the possession of police is Brady material even if prosecutor is unaware of it); Com. v. Gallarelli, 399 Mass. 17, 20 n. 4 (1987)(as matter of law, state laboratory report was under prosecutorial control, even thought no prosecutor had a copy of it nor knew of its existence).

[22] In Commonwealth. *v. Martin*, 427 Mass. 816, 823-24 (1998), the court reasoned that

> "[The] evidence was not in the prosecution's possession (or known to it), but rather was held by the State police crime laboratory and perhaps known only to one of its chemists. The prosecution had a duty to inquire concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory.... A prosecutor's obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has

does not extend to complainants and independent witnesses who are not agents of the prosecution with regard to some aspect of the case. *Commonwealth v. Beal*, 429 Mass. 530 (1999)(complainant); *Commonwealth v. Wanis*, 426 Mass. 629 (1998)(Rule 14 does not reach Internal Affairs Division records because the IAD is not part of the prosecution team).

OTHER REVISIONS

1. Motions for discovery. Although most discovery is made automatic under the rule, there may be additional items not encompassed by Rule (a)(1)(A) that are properly discoverable. Proposed Rule 14(a)(2) provides for motions to discover such material.

2. Notice and Preservation of evidence. The Committee added a new subsection, (a)(1)(E), titled "notice and preservation of evidence." Under this provision, *if* the prosecutor becomes aware of the existence of information that would be mandatory discovery but for the fact that it is not within the prosecutor's possession, custody or control, the prosecutor must notify the defendant of the existence (and only if known, the location) of the item. The defendant may then move for an order requiring the individual or entity in possession of the item to preserve it for a specified period of time. The provision also allows the court to modify or vacate any such order if it will create a significant hardship, provided the probative value of the evidence is preserved by alternative means.

3. Sanctions. Under proposed Rule 14, automatic discovery proceeds without a court order, simply by force of Rule 14. The Committee considered and rejected the alternative of having the court automatically *order* the mandatory discovery items at arraignment, but in subsection (a)(1)(C) provides that the automatic discovery provisions of subsections (a)(1)(A)(discovery to the defense) and (a)(1)(B)(discovery to the prosecution) "have the force and effect of a court order, and failure to provide discovery

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reported to the prosecutor's office concerning the case. Commonwealth v. Daye, 411 Mass. 719, 733, 587 N.E.2d 194 (1992). Commonwealth v. St. Germain, 381 Mass. 256, 261 n. 8, 408 N.E.2d 1358 (1980). Such a person is sufficiently subject to the prosecutor's control that the duty to disclose applies to information in that person's possession. Kyles v. Whitley, supra at 437, 115 S.Ct. 1555 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); Commonwealth v. Gallarelli, 399 Mass. 17, 20 n. 4, 502 N.E.2d 516 (1987)...."

Our draft does not reflect additional prosecutorial responsibilities that have been imposed in highly specific circumstances. For example, in *Com. v. Donahue*, 396 Mass. 590, 599, 602 a state conviction was reversed because "on the defendant's specific request for exculpatory materials in the possession of the F.B.I., the prosecutor was obliged either to seek the cooperation of the appropriate Federal authorities or, if he had a good faith reason for refusing to do so, to inform the defendant of that refusal." The SJC announced that "the following factors are important in determining whether the prosecutor is obligated to seek requested exculpatory evidence from Federal authorities: the potential unfairness to the defendant; the defendant's lack of access to the evidence; the burden on the prosecutor of obtaining the evidence; and the degree of cooperation between State and Federal authorities, both in general and in the particular case." Because such obligations are fact-dependent, we have not attempted to include them in our draft.

pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c)."

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Response to "Minority Reports" and Public Comments

Two members of the Committee (Pamela Hunt and Carmen Picknally) have filed minority reports in opposition to several of the proposed revisions of Rule 14 approved by the Committee. In this section, the majority of the Committee provides its response to these suggestions, along with the Committee response to other comments submitted during the public comment period.

We note that Committee members Hunt and Picknally filed an earlier memorandum to the Supreme Judicial Court in 1999, opposing the Committee's initial draft of Rule 14 and its release for public comment. In response to that earlier memorandum and to the public comments, the Committee made numerous and significant revisions to its original proposed Rule 14. It also thoroughly discussed and declined to adopt certain suggestions which are argued for in the most recent Minority Report.

No rule was as extensively discussed by the Committee as Rule 14 -- sporadically in 1995 and 1996, then almost continuously over 13 months of meetings from June 1998 through June 1999, and finally for several months following the public comment period. The Committee specifically considered and addressed each of the points in the public comments and minority reports, and benefited significantly from their analyses. We first set out the suggestions accepted by the Committee and then state reasons why the Committee rejected other suggestions. Each topic is numbered sequentially for ease of reference.

I. Major revisions to Proposed Rule 14 in response to public comments and earlier versions of the minority reports:

The proposed Rule 14 that was submitted to the SJC in October, 1999 has been changed in several respects in response to deliberations during the post-public comment period and earlier versions of the minority reports. The major revisions were:

(1) Modification of Rule 14(a)(1)(A)(vii) to limit the discovery of identification procedures to those "relevant to the issue of identity or to the fairness or accuracy of the identification procedures."

(2) Modification of Rule 14(a)(1)(A)(viii) to limit discovery of promises, rewards and inducements to those offered to "witnesses the Commonwealth intends to present at trial." The earlier proposal required discovery of promises, rewards and inducements to "potential Commonwealth witnesses".

(3) Modification of Proposed Rule 14(a)(1)(B), governing reciprocal discovery to the prosecution, to (a) allow the parties to set the deadline for reciprocal discovery and

(b) include reciprocal discovery of all promises, rewards or inducements made by the defense to witnesses it intends to use at trial.

(4) Modification of proposed Rule 14(a)(1)(E) to remove any obligation on the prosecution to investigate the *location* of an item it knows to exist in the possession of third parties.

(5) Modification of Rule 14(a)(3), regarding the Certificate of Compliance to be filed by each party after it has met its discovery obligations, as indicated by the additions in boldface: "Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, **to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts**..."

(6) Deletion of Proposed Section 14(a)(8), which would have allowed a party to move for permission to support or oppose a Rule 14 motion by means of a statement to be inspected by the judge alone, *ex parte.* (The Committee also directed the Reporters to include a comment in the Reporter's Notes on the inherent power of the court to do so in appropriate cases.)

(7) Addition of a new provision, section 14(a)(8), allowing a party to waive certain discovery rights and also allowing agreements between the parties altering some provisions of the Rule 14.

(8) Modification of Proposed Rule 14(d), defining "statement" for purposes of Rule 14, so as to exclude notes and drafts later incorporated in subsequent reports. This was considered especially necessary for police officers who take preliminary notes and later rewrite them into an official police report.

(9) Modification of subsection (a)(6), governing protective orders, to clarify that although a party must move for such an order, this does not imply that the moving party has the burden of proof.[23] The Committee added a final sentence to the subsection stating: "Nothing in this provision shall be deemed to alter the allocation of the burden of proof with regard to the matter at issue, including privilege."

(10) During the post comment period, the Committee decided that some issues were better handled in the Reporter's Notes, and received commitments from the reporters to include in the Notes, inter alia, the following statements:

(a) A statement that language in the first paragraph in Proposed Rule 14(a)(1)(A) – which limits the Commonwealth's discovery obligation to material "*in the possession, custody or control of the prosecutor, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report*

[23] It is often the case that the moving party does not bear the burden of proof. See, e.g., Commonwealth v. Antebenedetto, 366 Mass. 51, 57 (1974)(the defendant must move to suppress a warrentless search, but the burden of proof lies on the prosecution to justify it.)

to the prosecutor's office or have done so in the case..." – is not intended to change existing case law but reflects it, with citations to *Commonwealth v. Beal,* 429 Mass. 530 (1999) (construing this criterion to exclude complainants and independent witnesses who are not agents of the prosecution with regard to some aspect of the case) and *Commonwealth v. Wanis*, 426 Mass. 629 (1998)(Rule 14 does not reach Internal Affairs Division records because the IAD is not part of the prosecution team).

(b) In the Commentary dealing with Proposed Rule 14(a)(1)(A) and (B) (concerning presumptive discovery of a witness' name and address), a reference to MGL 258B sec. 3(h), which allows a person to request non-disclosure of his or her address, telephone number, or place of employment or education; and to the possibility in such cases of using Rule 14(a)(6)'s protective order procedure to prevent such disclosure. The Commentary will also note that the prosecution ordinarily provides the business address of police witnesses in satisfaction of its obligation to provide witness' addresses.

(c) In the Commentary to Rule 14(a)((1)(A)(iii), a statement that *at present,* case law defines exculpatory evidence to include (but not necessarily be limited to) all information that is material and favorable to the accused because it tends to cast doubt on defendant's guilt as to any essential element of the crime charged, including the degree of the crime; or tends to cast doubt on the credibility of a Commonwealth witness, or on or accuracy of any scientific evidence, that the government anticipates offering in its case-in-chief.[24]

(d) In the Commentary to Rule 14(a)(1)(A)(viii), as noted above the Reporters were asked to include a statement that this provision (concerning promises and inducements, which the Commonwealth must disclose only as to witnesses it *intends to present at trial*) does not exhaust the Commonwealth's constitutional obligation to disclose all exculpatory evidence. Such exculpatory evidence could, for example, include a promise or inducement made to a hearsay declarant whom the Commonwealth does not intend to present at trial.

(e) In the Commentary to Rule 14(a)(1)(B), a reference to *Commonwealth v. Reynolds,* 429 Mass. 388 (1999) and its holding that the pretrial report in that case obligated defense counsel to provide not only statements of witnesses it intended to introduce, but also statements of *Commonwealth* witnesses that the defendant intended to use in cross examination.

(f) In the Commentary to Rule 14(a)(1)(E), which requires the prosecution to notify defense counsel of evidence it knows to exist but which is not discoverable because not in the prosecution's possession, custody or control: a statement that this provision applies only to items in the possession of those who are not subject to Rule 14's discovery obligations, (ie. third parties not part of the prosecution team).

[24] At its most recent meeting, the Committee revised the description of "exculpatory evidence" in response to suggestions in the 2001 minority reports.

(g) In Commentary to the rules generally, or in an appropriate rule covering motions generally, a statement that nothing in the Rules is intended to prohibit the court from ex parte consideration in appropriate circumstances, consistent with law.

(h) In the Commentary to both 14(a)(1)(C) and 14(c), a statement underscoring that the former rule confers the force and effect of a court order on the automatic discovery requirements of 14(a)(1)(A) and (B), and violations of those two subsections are therefore subject to any of the sanctions authorized by 14(c) for violation of a discovery order.

II. Responses to the Minority Reports and to major suggestions in public comments *not* adopted by the Committee

In this section, the Committee responds to suggestions and arguments in some public comments and in the two minority reports that it did not accept. Some were rejected because they were based on inaccurate renditions of the rule. Some were believed to contradict relevant case law that requires the procedures included in the proposed rule. And some reflect a rejection of the policy the Committee adopted and still believes should be implemented -- a policy favoring full and automatic discovery in the criminal trial courts without the necessity of moving and arguing on each item anew in every case.

a. Arguments based on inaccurate renditions of the proposed rule

(11) *Claim that the Commonwealth has a new obligation affirmatively to search for third party evidence.*

[Re: 14(a)(1)(A)]

Rule 14 does not expand a prosecutor's obligation to provide discovery of evidence in the hands of third party beyond the bounds of what the SJC has already decided in relevant caselaw. But according to the Minority Reports and various prosecutors' memoranda, some provision in Rule 14 would create a new obligation to search for third party evidence. Allegedly, the Rule would:

> -- require "an unending search of . . . private files. . . It also opens private files of those citizens and businesses that are victims of or witnesses to crime."[25]
>
> -- require the prosecutor "to seek out vast but undefined information from third parties,"[26] "ferret out and disclose material on behalf of the defense from independent third parties....[and make] third party discovery procedure...the predominant responsibility of the prosecutor..."[27]

[25] 2001 Picknally Minority Report, p. 1.

[26] 2001 Hunt Minority Report, p. 4.

[27] 1999 Hunt memorandum, pp. 3 and 2. See also *id.* p. 3 (prosecutor would have to undertake the defense function of "determining what third party evidence, not in the possession of an agent of the prosecution, may be relevant and material to the defendants theory of the case, and then [seek] disclosure of such

-- "expand the prosecutor's discovery obligation to items beyond the prosecutor's possession, custody, or control,"[28] and require prosecutors to search the files of police departments in other counties because any such agency might have information concerning a witness.[29]

-- open "every file of every government agency of the Commonwealth and the Commonwealth's subdivisions."[30]

-- "overrule existing case law"[31]

There is nothing in proposed Rule 14 that resembles these descriptions. The proposal does not even remotely require prosecutors to search for discoverable material in the possession of third parties or government agencies unless they are involved in investigating or prosecuting the case or otherwise acting as agents of the prosecution's team. In fact, the proposed rule was drafted to follow Ms. Hunt's suggestion that the prosecutor's obligation be described according to the language of *Commonwealth v. Daye*, 411 Mass. 719 (1992). That case describes the prosecutor's obligation as extending to

> "material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office." *Daye* at 734

The language of the rule is virtually identical.[32] Because this language also appears in numerous discovery cases from *Commonwealth v. St. Germain*, 381 Mass. 256 (1980) to *Commonwealth v. Beal,* 429 Mass. 530 (1999), it can hardly be seriously maintained that Rule 14's adoption of this standard is an effort to "overturn existing caselaw"; indeed, this very standard appears in three of the four cases the 1999 Picknally memorandum cited to oppose it.[33] Thus the extravagant scenario envisioned by these

evidence.")

[28] 2001 Picknally minority report, p. 2.

[29] 1999 Picknally memorandum, p. 14.

[30] 1999 Picknally memorandum, p. 1.

[31] 1999 Hunt memorandum, p. 3. In the 2001 minority report, p. 7, Attorney Hunt asserts that the rule "creates a sense that [it] intends to expand the obligation beyond current case law" interpreting ":possession, custody and control."

[32] Proposed Rule 14(a)(1)(A) requires the prosecution to disclose itemized information provided it is relevant to the case and "*is in the possession, custody or control of the prosecutor, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case...*". (emphasis added).

[33] The 1999 Picknally memorandum, pp. 3-4, cites four cases. Three of the four contain language that is identical in substance to the *Daye* language, and thus the language in Proposed Rule 14. The fourth, while referring only to discovery of police evidence, is entirely consistent with *Daye*. We take each in turn:

1. Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998)(holding that the prosecutor had a duty to inquire of the State police laboratory, and that the state chemist's evidence -- not in the prosecutor's possession and perhaps known only to the chemist -- should have been turned over to the defendant): "A

memoranda -- that the proposed language would require the prosecutor to deliver all records in the possession of the victim or other third parties, and be "responsible for personally searching thousands of documents"[34] -- has already been soundly refuted by the very cases they cite. The prosecution will have to inquire of only those agencies and persons already mandated by caselaw.

In *Bacigalupo v. Commonwealth,* SJ-96-0300, a single justice opinion, Justice Wilkins suggested that the Standing Advisory Committee consider whether it would be helpful "to have a rule that more fully describes the scope of a prosecutor's duty of inquiry." The Standing Committee did just that, and proposes incorporating the standard applied by the Supreme Judicial Court for the past two decades. This remains the central criteria in the cases, and we are wary of substantially revising this language. The Committee rejected proposals to include language it found broader than existing caselaw, such as alternative proposals to (1) require the prosecution to search all government agencies for exculpatory evidence, or (2) require the court to issue an order preserving

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prosecutor's obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case."

2. *Commonwealth v. Wanis*, 426 Mass. 629 (1998), concerned evidence in the possession of an independent police agency -- the Internal Affairs Division -- which was not involved in the investigation and prosecution of the criminal case. The Court stated that existing Rule 14 did not reach the I.A.D. records, but only those "police officers who are participants in the investigation and presentation of the case and police officers who regularly report to the prosecutor or did so in reference to a given case." Because the IAD does not report to the prosecution, neither the existing nor proposed Rule 14 would reach such statements. (*Wanis* also held that a judge should normally issue a subpoena to obtain such evidence for the defendant, and that would remain the procedure under Proposed Rule 14.)

3. *Commonwealth v. Beal,* 429 Mass. 530 (1999) utilizes the contested language and holds that the prosecutor need not seek out information in the possession of an independent witness who "in no way [acts as an] agent of the prosecution team" such as a complainant, but *is* so obligated when the individual "has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case," citing *Martin*. (*Beal* at 532.) This language is identical in substance to that in the Proposed Rule.

4. *Commonwealth v. Delp,* 41 Mass. App. Ct. 435, 442 (1996), held that the prosecutor had no obligation to turn over the Dept. of Social Service's diagnosis of the victim, finding the prosecutor's duty does not extend to evidence held by any and all governmental agencies, absent factors that extend that obligation. Proposed Rule 14 in no way alters this holding. The Dept. of Social Services would not be subject to Rule 14 discovery unless it acted as an agent of the prosecution team.

The 1999 Picknally memorandum also complains that the Proposed Rule would make prosecutors "responsible for discovery they do not even know exists." But nothing in the Proposed Rule varies from existing Rule 14 in this respect: in both, the prosecutor does have an obligation to inquire of agents of the prosecution team, but not more broadly. Here it is the Picknally memorandum that apparently seeks to overturn existing caselaw by eliminating all duties of inquiry. See, e.g., *Kyles v. Whitley*, 514 US 419 (1995)(prosecutor has duty to learn of exculpatory evidence regardless of any failure by the police to bring favorable evidence to the prosecutor's attention); Com. v. Baldwin, 385 Mass. 165, 177 n. 12 (evidence in the possession of police is Brady material even if prosecutor is unaware of it); *Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998)(conviction reversed because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth crime lab); *Com. v. Gallarelli*, 399 Mass. 17, 20 n. 4 (1987)(as matter of law, state laboratory report was under prosecutorial control, even thought no prosecutor had a copy of it nor knew of its existence).

[34] 1999 Picknally memorandum, p. 14.

notes, tapes and other evidence pertaining to the case which are in the possession of such agencies. Rather, the Committee adopted the *Daye* language specifically urged by Ms. Hunt. In short, the minority reports argue against proposals that were *rejected* and appear nowhere in the Proposed Rule.

Moreover, the Committee also instructed the Reporters to include in the Reporters Notes a statement that the language limiting the Commonwealth's discovery obligation -- to material "in the possession, custody or control of the prosecutor, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case..." – is not intended to change existing case law but reflects it. The Comment will underscore *Commonwealth v. Beal's* construal of this long-established criterion as excluding complainants and independent witnesses who are not agents of the prosecution with regard to some aspect of the case, 429 Mass. 530 (1999); and reference to the holding of *Commonwealth v. Wanis*, 426 Mass. 629 (1998)(Rule 14 does not reach Internal Affairs Division records because the IAD is not part of the prosecution team).

[Re: 14(a)(1)(E)]

There *is* one new obligation concerning third-party evidence in Proposed Rule 14, however. Proposed subsection 14(a)(1)(E) provides that *if* the prosecution becomes aware of the existence of information that would be mandatory discovery but for the fact that it is not within the prosecutor's possession, custody or control, it must notify the defendant of the existence (and only if known, location) of the item. There is nothing here that imposes the kinds of obligations alleged by some of the prosecutors' memoranda -- no duty to "search for" evidence, no duty to pore through "thousands" of third party or government agency documents, nothing making "third party discovery procedure...the predominant responsibility of the prosecutor ... [by imposing a] duty affirmatively to seek out evidence in the possession of third parties."[35] This provision applies only to evidence *already known to exist without inquiry by the prosecutor;* and only to evidence held by independent third parties who are *not* part of the prosecution team and thus not subject to rule 14 discovery (contrary to the assertions in Picknally min. rept. p. 5[36] and Hunt min. rept. p. 7, pt. 6). It simply places the defendant in a position to move the court for an order preventing destruction of the evidence so that a subsequent defense subpoena may be effective.[37]

Nor can it be fairly said that proposed Rule 14 "opens private files of those citizens and businesses [who are] victims of or witnesses to crime," as alleged in the Picknally minority report at 1. If such files are ultimately brought to court, it is not via

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[35] 1999 Hunt memorandum, p. 2.

[36] The 2001 Picknally minority report, at p. 5, ignores the language of proposed rule (a)(1)(E) in asserting that this provision requires the prosecution to search for and disclose forensic evidence in the Commonwealth crime lab. This provision does not apply to any part of the Commonwealth prosecution team, but only to third parties that have evidence *known to the prosecutor* which, if held by the prosecution team, would be discoverable. It also does not require any inquiry at all.

[37] Proposed Rule 14(a)(1)(E).

Rule 14 but via court-ordered subpoenas guaranteed by the sixth amendment right to compulsory process. Independent witnesses have always been subject to subpoenas and, as a lesser intrusion included within that power, the obligation not to destroy evidence identified by court order. To provide a party or independent witness with recourse when a preservation order is inappropriate or unnecessary, the rule provides for motions to vacate or modify the preservation order, or to protect the probative value of the evidence by alternative means.

(12a) *Claim that the rule imposes "new discovery burdens only on prosecutors" and "tilts the playing field against the Commonwealth"*[38]*;*

(12b) *Inaccuracies concerning reciprocal discovery to the prosecution. [Re (a)(1)(B)]*

Contrary to the above claim that no new discovery requirements are placed on the defendant, Proposed Rule 14 greatly *expands* the defense reciprocal discovery obligation. Under Proposed Rule 14(a)(1)(B), when the prosecution certifies that it has disclosed and made available the discoverable items it has, it is entitled to *automatic* reciprocal discovery. The existing rule leaves reciprocal discovery to the prosecution subject to the court's discretion; discovery is currently mandatory only in favor of the defense.

Consequently, the proposed rule is even-handed, and nowhere in the minority reports is a specific case made out otherwise. It does make certain items of discovery mandatory and automatic without motion, but imposes this obligation on *both* sides. Any differences between the obligations on the two parties results from constitutional requirements. There are two: (1) The defense obligation is limited to evidence it intends to introduce at trial, whereas the prosecution must turn over some evidence it may intend not to use (and in the case of exculpatory evidence, is constitutionally required to). *Both* proposed and existing Rule 14 limit reciprocal discovery to "intended" defense evidence because (as the existing Reporter's Notes explain) the U.S. Supreme Court case of *Williams v. Florida*, 399 U.S. 78 (1970), upheld the constitutionality of prosecutorial discovery only on the basis of this limitation. That decision reasoned that so long as prosecutorial discovery is limited to evidence the defendant has decided to use at trial, the discovery order only affects the timing of the disclosure; but an order that reached information known but unintended for trial would demand disclosure of unwaived evidence in violation of the privilege against self incrimination.[39] (2) In *Wardius v Oregon*, 412 U.S. 470 (1973), the Supreme Court found reversible error, in violation of due process, for the prosecution to receive categories of discovery without discovery of those same categories to the defense. To assure against such reversible error, and to allow defendants to assess what evidence they should introduce as required by the *Williams* "intended evidence" constitutional limitation, our Rule provides for defense

[38] 2001 Picknally Minority Report, p. 7.

[39] *Commonwealth v. Reynolds*, 429 Mass. 388 (1999), cited by the 2001 Picknally minority report at 4, does not say that under Rule 14 the defense may be compelled to turn over any evidence it has, whether intended for trial or not -- which would violate the defendant's privilege against self-incrimination as noted above. Rather, that case held that pursuant to a pretrial agreement requiring the exchange of all witness statements, the defendant was required to turn over statements of Commonwealth witnesses it intended to use at trial to impeach those witnesses, as well as those of its own witnesses.

discovery to take place first (as does Fed. R. Crim. P. 16(b)), followed by prosecutorial discovery.

The Picknally memoranda also misconstrue Rule (a)(1)(B) as "narrowing the scope" of reciprocal discovery from the existing rule because it limits that discovery to evidence the "defendant intends to use at trial."[40] But the existing rule and proposed rule are *identical* in this respect. Existing Rule 14(a)(3) provides that

> …the judge *may***,** upon motion by the Commonwealth**,** condition his order by requiring the defendant to permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(2) *which the defendant intends to use at trial*, including the names, addresses, and statements of those persons whom the defendant *intends to use as witnesses at trial* (emphasis added)

Proposed reciprocal discovery rule 14(a)(1)(B) provides that

> . . . the Defendant *shall* permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(v)**,** (vi)**,** and (viii) *which the defendant intends to use at trial*, including the names, addresses, dates of birth, and statements of those persons whom the defendant *intends to use as witnesses at trial.* (emphasis added).

(13) *Claim that parties cannot stay the discovery process without going back to court.*

[Re Rule (a)(8)]

The Picknally minority report (p. 4 discussions on secs. (b) and (c)), forsees "an enormous amount of paperwork" because parties cannot change the discovery schedule without court consent. But Rule (a)(8) allows the parties to change discovery requirements by waiver or agreement, providing that "a party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties."

(14) *Claim that instituting automatic discovery will increase burdens on the courts.*

[Re 14(a)(1)]

According to the Picknally 2001 minority report, p. 1, automatic discovery "will not result in a reduction in the number of discovery motions filed," but in fact "motion practice will increase." He argues that defense lawyers will continue to file motions to guard against ineffective assistance claims (despite proposed rule 14(a)(1)(C)'s provision that automatic discovery requirements have the effect of a court's discovery order). We

[40] 1999 Picknally memorandum, p. 10. *See also* 2001 Picknally minority report, p. 4.

note that an earlier version of the minority report, the Picknally 1999 memorandum, argued against automatic discovery on the opposite ground that it would promote defense counsel inattention because they would no longer have to file "a discovery motion [most of which] are word-processed boilerplate, and so not particularly onerous to generate."[41] We believe the earlier rendition was correct: such boilerplate motions, being unnecessary, will be uncommon if the proposed rule is promulgated. We do not believe, however, that continuing to burden the court with boilerplate motions, and adjudication thereof, is a way to promote more effective counsel or more just trial results. Hence a large majority of the Committee continues to endorse a transition to automatic discovery.

Both minority reports also argue that the proposed rule will lead to massive litigation. The Hunt minority report (at 4) argues that the prosecutor will frequently repair to court because she will not know what is "relevant" evidence.[42] As we discuss in more detail below at topic 17-b, the requirement to turn over "relevant" enumerated items is no different than what already exists -- in the District Court pursuant to the automatic discovery order required by M.G.L. c. 218. sec. 26A,[43] and in Superior Court cases where "boilerplate" discovery motions typically use similar language. Discovery pursuant to this term now "proceeds routinely without controversy or enmity" in both courts according to the minority report,[44] and there is no reason that the relevance criterion will become untenable when it is used in a court rule rather than statute or motion.

(15) *Claim that the proposed rule "may have come at least in part from dissatisfaction with some of this Court's decided cases."*

This claim in the Hunt minority report at 3 is unsupported by citation or analysis of any case. In fact, it is the *current* rule 14, which the minority report seeks to maintain, that contradicts both statutes (M.G.L. c. 218, sec. 26A) and cases handed down since its promulgation three decades ago (as indicated in footnotes to the marked-up proposed rule). We also note that, with regard to the proposed (a)(1)(A) provision limiting the scope of the prosecution's obligation to items held by the prosecution team, it is the two minority reports that oppose the insertion of language taken almost verbatim from an unbroken line of SJC cases, and that was thought necessary by Justice Wilkins in *Bacigalupo v. Commonwealth,* SJ-96-0300. But the Hunt minority report at 7 argues that by the very addition of caselaw language, the provision somehow "creates a sense that the proposed Rule in fact intends to expand the obligation beyond current case law."

b. Arguments reflecting policy differences

[41] 1999 Picknally memorandum, p. 3.

[42] 2001 Picknally minority report, p. 1; 2001 Hunt minority report, p. 4

[43] Sec. 26A provides for an automatic order in District Court requiring discovery to the defense of "any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments . . ."

[44] Hunt minority report at 2.

We now address the objections that reflect significant policy differences between the two prosecutor members and the majority of the Committee. Parenthetically, we should note that although the Hunt memorandum submitted to the SJC in 1999 described these policy choices as "party-line" votes, it is more accurate to say that while the prosecutors did dissent, the defense bar members were joined in these votes by most of the clerks, judges and academics on the committee.

(16) *Is Revising Rule 14 Necessary?*

The Hunt memoranda argue that there are no reasons that "call for amendment to the rule at all."[45] Apart from the case made below for improving pretrial discovery procedures, it is beyond doubt that Rule 14 must be significantly amended because it no longer complies with caselaw and statutes in numerous areas. Existing Rule 14 makes most discovery discretionary with the court -- yet since 1993, M.G.L. c. 218. sec. 26A has made discovery of most of these items mandatory in District Court.[46] (So does District Court/BMC Rule 3, which requires a wide-ranging, automatic discovery order at arraignment.[47]) And in Superior Court, a standing order similarly conflicts with Rule 14.[48] Existing Rule 14 is wholly misleading as to the discovery requirements resulting from these developments, whereas the Proposed Rule incorporates the legislative requirements in its enumeration of items at 14(a)(1)(A)(i)-(viii).

The list of items now included as mandatory discovery in Proposed Rule 14(a)(1)(A) also reflects caselaw requirements in a few cases. We cite these cases in footnotes to the version of the Proposed Rule that is marked up to show all modifications, which appears below.

(17) *Should discovery to both defense and prosecution be made comprehensive and automatic?*

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[45] 1999 Hunt memorandum, p. 1; 2001 Hunt minority report, p. 2.

[46] Sec. 26A provides that a District Court judge shall, upon the defendant's motion or the court's own motion, "issue an order of discovery requiring any information to which the defendant is entitled and also requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody or control of the prosecutor or persons under his direction and control. Upon motion of the defendant the judge shall order the production by the Commonwealth of the names and addresses of the prospective witnesses and the production by the Probation Dept. of the record of prior convictions of any such witnesses."

[47] Under BMC/Dist Ct rule 3(a), the defendant's criminal record and police reports must be given at arraignment, and under Rule 3(c) an order for other discovery pursuant to c. 218 sec. 26A must be issued at arraignment.

[48] Automatic and mandatory discovery of a wide range of items is already mandated in Superior Court by Standing Order 2-86, although how cognizant the participants are of this order is subject to question. According to Part II of the Standing Order, the prosecutor is required to provide a "discovery package" to defense counsel at arraignment which includes: copies of all discoverable police reports, copies of written statements of the defendant and witnesses available to the prosecutor, copies of scientific reports and other documentary evidence available to the prosecutor, an opportunity to examine photographs and real evidence, and the Grand Jury minutes.

[Re 14(a)(1)(A) and (B)]

The Proposed Rule does reflect a basic policy choice favored by the Standing Advisory Committee but opposed by some prosecutors' comments and the minority reports. The choice faced by the Committee was whether to institute (1) even-handed, comprehensive and automatic discovery to both sides, while guaranteeing both parties the opportunity to obtain a stay and seek protective orders they deem appropriate, or (2) maintain a system by which most discovery to the defense, and all discovery to the prosecution, is discretionary with the court, and must be adjudicated by motion. The Committee chose the first option. We believe this choice promises to promote the fairness of trials and significantly lighten the burden on the courts and counsel, for several reasons. First, it is simply inefficient to insist on pretrial discovery motions and argument in areas where discovery is almost always ultimately afforded in practice. Requiring motions and hearings to obtain basic discovery simply delays the case and absorbs court and counsel time and expense. It is far more efficient to provide automatic discovery of such items to both sides, so long as all parties have a full opportunity to argue against discovery of any of these items where special circumstances in the case warrant divergence from these presumptive procedures. (Proposed Rule 14(a)(1)(C) provides for a mandatory stay of discovery of any item that the obligated party believes should not be disclosed, pending resolution by the court.)

Second, automatic discovery early in the case provides the defense with notice of the Commonwealth's case prior to plea negotiations or the filing of other pretrial motions. Counsel cannot adequately discuss the possibility of a plea or admission, nor know whether to file motions to suppress or to dismiss, without having previously reviewed discovery -- yet the current Rule often results in exactly that.

Third, we believe that a just result is more likely when discovery is open and even-handed. Automatic, comprehensive discovery affords both the prosecution and defense a full opportunity to prepare the case, rather than be hijacked by surprise evidence, as the Supreme Court has noted.[49] Making discovery mandatory to both sides also assures that one party will not be disadvantaged by a comparative inability to prepare.[50]

By contrast, the minority reports and some prosecutors' memoranda submitted during the public comment period object to this choice.[51] They argue that a defendant's

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[49] See *Wardius v. Oregon*, 412 US 470, 473-74 (1973)("the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.... The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. ")

[50] The even-handedness of the rule is an important component of the proposal that is obscured in the prosecutors' memoranda. For example, the Picknally memorandum, p. 2, argues against the Rule because it makes "discovery for the defense automatic and mandatory," but nowhere notes that it provides automatic, mandatory discovery to the prosecution as well.

[51] 1999 Picknally memorandum at pp. 2-3; Essex County District Attorney's Office comment by Robert J. Bender, at last two pages; Middlesex District Attorney's Office comment by Marguerite Grant, at p. 1.

affidavit and court adjudication should be required for each item of discovery. Without addressing the burdens imposed on all participants by this piecemeal, labor-intensive approach, various memoranda argue that dispensing with this procedure would:

(a) *Violate Art. 14 of the Mass. Constitution*, in that it would impose an unconstitutional search and seizure upon the Commonwealth to require it to provide evidence without a showing of cause supported by an affidavit. Under this view, mandatory discovery under current Rule 14, the discovery now required in District Court under M.G.L. c. 218 sec. 26A**,** and court orders requiring witness lists or other information from the prosecution, are all unconstitutional because unsupported by affidavit. This is an entirely novel assertion, made without reference to any caselaw in this or any other jurisdiction. To our knowledge it has never been held that the Commonwealth has an expectation of privacy in general, nor in the evidence it is gathering for purposes of prosecution. Rather, when the Commonwealth chooses to bring a prosecution, it can be held to such reasonable rules of procedure that are necessary to promote a fair trial. For example, even when the defendant has filed no discovery motion or affidavit at all, the government is required to provide discovery of what exculpatory evidence it has.[52]

(b) *Make it impossible for the prosecution to know what evidence to turn over because "the prosecutor would have little guidance on what might ultimately be deemed 'relevant' and because the Rule creates an obligation to seek out vast but undefined information from third parties."*[53] We have demonstrated above that the latter "obligation" does not exist in the proposed rule. As to the claim that "relevant to the case" is too uncertain a guide, this has not proved to be a problem in the district courts which operate according to this very criterion pursuant to M.G.L. c. 218. sec. 26A. Although the Hunt minority report asserts that a defense motion gives notice of what is sought,[54] most discovery motions contain no additional information about the items that are included in the proposed rule, and present Rule 14 does not require the defendant to present more specifics, let alone a theory of the case, to obtain discretionary discovery. Prosecutors, not defendants, know what evidence the prosecution possesses; and prosecutors can know whether the items listed in Rule 14 (for example, the names of prospective witnesses and intended experts, police reports, intended exhibits, identification procedures, promises and rewards to witnesses, etc.) are relevant to the defendant's case. Items that the prosecutor has no reason to believe are relevant to the case are not covered, and the burden is on the defendant to file a motion for discovery under subsection (a)(2) and demonstrate that such seemingly irrelevant items are indeed material. It is also important to recognize that a discovery rule must be phrased at some

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[52] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985); *Commonwealth v. Simmons*, 417 Mass. 60 (1974).

The Grant memorandum further claims that art. 14 bars the preservation of evidence provision at (a)(1)(E)(2) in that it would reach the possessions of private, independent parties. But as the rule clearly indicates, this is to be accomplished by pretrial motion, not by automatic discovery. Automatic discovery does not apply to independent parties.

[53] 2001 Hunt minority report, p. 4. The argument is expanded at *id.* p. 6-7.

[54] 2001 Hunt minority report, p. 6.

level of generality; as always, case law developed through the adversary process will continue to resolve highly specific disputes not already determined by Rule 14 and existing cases.

(18) *Should Rule 14 apply uniform requirements – including discovery deadlines -- to both the District and Superior Courts?*

The Hunt minority report argues that the Superior Court needs different rules governing pretrial discovery than the District Court.[55] (In contrast, Judge Blitzman's public comment asked that the same procedures be utilized in Juvenile Court as in District Court.) While it is true that there is a great difference in the volume and complexity of cases in the two courts, there is no showing that the procedures envisioned are not suitable for both.

The minority report argues that the rule is inapt for superior court prosecutors because it is impossible for them to have "the whole case fully planned, and [know] what expert witnesses will be used by the time of the pretrial conference,"[56] but the proposed Rule does not require that. It does require that the information then in the prosecutions custody or control be disclosed by the pretrial conference, but anticipates that further investigation and preparation will occur, and for evidence obtained at that point Rule 14(a)(4) provides a continuing duty to turn over later-discovered evidence. It is also worth noting that the pretrial conference deadline is later than the Superior Court itself thought advisable when it issued Standing Order 2-86, ordering prosecutors to deliver a "discovery package" at arraignment.[57] The Committee chose the pretrial conference as the deadline for defense discovery because defense counsel should not be expected to discuss the possibility of a plea without an awareness of the Commonwealth's existing evidence, nor expected to discuss or file suppression or other pretrial motions (which require affidavits stating grounds) without discovery. These considerations are equally applicable in both superior and district courts.

While different discovery rules may have been appropriate when the District Court provided a second de novo trial, that era has passed. In the absence of any argument showing that the open and automatic discovery rules already successful used in District Court cannot work in Superior Court, the Committee voted to promulgate one procedure applicable to both.

We believe that to utilize two different standards in the Rule, as Attorney Hunt suggests, poses significant problems in the long run. Because there is no obvious principled reason why jury trials in District Court and Superior Court should afford

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[55] 2001 Hunt minority report, p. 4-5.

[56] 2001 Hunt minority report, p. 5. The same argument is made in the 2001 Picknally minority report at p. 2.

[57] The discovery package is to include copies of all discoverable police reports, copies of written statements of the defendant and witnesses available to the prosecutor, copies of scientific reports and other documentary evidence available to the prosecutor, an opportunity to examine photographs and real evidence, and the Grand Jury minutes.

differing degrees of discovery, a rule that incorporated two very different lists of items subject to mandatory disclosure would undermine the legitimacy of each, promote litigation, and lead to unnecessary confusion and contradictory case law.

(19) *Claims concerning particular items of discovery*

a. Proposed rule 14(a)(1)(A) largely replicates the list of discoverable items in M.G.L. c. c. 218.

[Re 14(a)(1)(A), generally]

The Picknally minority report objects to converting most of the items of "discretionary" discovery in existing Rule 14 to "mandatory" discovery. What the minority report does not address is the fact that most of the items it objects to are *already* mandatory discovery in District Court pursuant to M.G.L. c. 218, sec. 26A or caselaw.[58] (The marked-up proposed rule, below, includes several footnotes to individual items on the list, detailing their status as mandatory or discretionary according to current law, whether by statute or caselaw.) So long as this statute and caselaw exist, existing Rule 14 is seriously misleading in many cases; and the minority report's views could only be realized by rewriting Rule 14 to establish two different sets of discovery rights, with lesser crimes in district court afforded far greater discovery than the most serious felonies.

b. Discovery of grand jury minutes

[Re 14(a)(1)(A)(ii)]

The Picknally minority report suggests that subdivision (a)(1)(A)(ii) require discovery only of the minutes of the grand jury "that formed the basis of the indictments

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[58] For example, the following "discretionary" discovery under Rule 14 is now mandatory at least in district court:

1. Substance of oral statements of defendant or co-defendant. Relevant "statements of persons" are mandatory discovery under sec. 26A. But caselaw has spelled out that this must include the defendant's and codefendant's oral statements. This discovery must be provided "as a matter of course to counsel for the defendant" according to Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975). See also Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933 (1983).

2. Names addresses and birth dates of prospective witnesses. Sec. 26A makes defense discovery of names and addresses of Commonwealth witnesses a matter of right, and also requires the Court to order the Probation Department to produce the prior criminal record of these witnesses. The Committee added the "date of birth" requirement because the Probation Department needs that information to obtain such records.

3. Expert Opinion evidence. Sec. 26A requires both "statements of persons" and also "reports of physical or mental examinations of any persons or of scientific tests or experiments."

4. "All other relevant and material evidence." This item is included as mandatory discovery in s. 26A ("any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control").

in the case on trial." The Committee rejected this suggestion because other grand jury proceedings may have looked into the same case or indicted co-defendants. Current rule 14 has no such limitation, making *mandatory* discovery of all relevant "written or recorded statements of a person who has testified before a grand jury" so long as they pertain to the case. The proposed rule adds to this "the grand jury minutes" that are relevant to the case.

c. *Comment that the exculpatory evidence provision should specify what kind of evidence is included.*

[Re 14(a)(1)(A)(iii)]

Charles Rankin, a Massachusetts attorney who served on the committee that drafted the local federal discovery rules, submitted a comment asking that Proposed Rule 14 be revised to specify the kinds of items that are considered "exculpatory evidence." He suggested that the Committee include a provision similar to that promulgated by the U.S. District Court for Massachusetts in its Rule 116.2, because it would provide common ground that need not be relitigated in each case; obviate the need for defense motions specifying every kind of exculpatory item; and minimize the likelihood that a prosecuting attorney will not turn over evidence because she misunderstands her obligations. The Committee decided that such comprehensive treatment is unwise and unnecessary in our rules because the subject is one of constitutional dimension that may well continue to be refined by case law. While voting to leave the issue to the courts, the Committee also thought a summary of the present state of the law on the subject should be included in the Reporter's Notes, with the caveat that caselaw may continue to evolve. The Notes would state that *at present,* case law defines exculpatory evidence to include (but not necessarily be limited to) all information that is material and favorable to the accused because it tends to cast doubt on defendant's guilt as to any essential element of the crime charged, including the degree of the crime; or tends to cast doubt on the credibility of a Commonwealth witness, or on or accuracy of any scientific evidence, that the government anticipates offering in its case-in-chief.[59]

d. Objection that discovery of the birthdates and addresses of witnesses (a) should be by motion,[60] and (b) should exempt police and expert witnesses.[61]

[Re: 14(a)(1)(A)(iv), 14(a)(1)(B)]

Proposed Rule 14(a)(1)(A) and (B) respectively afford the defense and prosecution presumptive discovery of a witness' name and address, although if the opposing party deems non-disclosure appropriate to the case it can move for a protective order and obtain an automatic stay until the court rules.[62] Some prosecutors' comments

[59] At its most recent meeting, the Committee revised the description of "exculpatory evidence" in response to suggestions in the 2001 minority reports.

[60] 2001 Hunt minority report, p. 6

[61] 2001 Picknally minority report, pp. 1-2.

[62] Proposed Rule 14(a)(1)(C).

argued that this violates or at least partly vitiates M.G.L. c. 258B, sec. 3, the victim's rights law.[63] That statute, however, nowhere seals a witness' identity or address as a general matter. Rather, it affords every witness a right to move the court for an order of confidentiality -- exactly as Proposed Rule 14 provides. The Reporters Notes will include a reference to MGL 258B sec. 3(h), which allows a person to request non-disclosure of his or her address, telephone number, or place of employment or education; and to the possibility in such cases of using Rule 14(a)(6)'s protective order procedure to prevent such disclosure.

The Picknally minority report objects to the discovery of dates-of-birth of police witnesses, experts, record custodians and others. Birthdates are important to investigating the witness generally and also to obtaining any prior record that exists. The Committee decided that the rule should not *automatically exclude* police officers (who are not barred from employment despite a record of misdemeanors which could be admissible for impeachment). The defendant or prosecutor should be entitled to investigate and discover possible impeachment material concerning *any* witness, and no witness should be certified as presumptively more credible than others. The existing rule also makes no such distinction.

As to police addresses, the Committee and reporters agreed that the Reporters Notes will state that the prosecution ordinarily provides the business address of police witnesses in satisfaction of its obligation to provide witness' addresses.

e. Experts and expert's publications

[Re: 14(a)(1)(A)(v)]

The minority reports object to proposed rule 14(a)(1)(A)(v)'s requirements that experts be identified prior to the pretrial conference, and their publications disclosed.[64] It is important to note that only experts *intended for trial* need be identified, and neither party is constrained from identifying experts retained or discovered after the pretrial conference (although the continuing duty provision would require a party to provide the additional information when in the course of trial preparation a new expert witness was added to the case). Only evidence in the possession, custody or control of the prosecution at the time of the pretrial conference is due at that time.

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[63] 1999 Hunt memorandum, p. 4; 1999 Picknally memorandum, p. 6; Attorney General's Office comment of Attorneys Leone and Parks, p. 12. The two subparagraphs of M.G.L. c. 258B sec. 3 the latter cites are (d) and (h). Only (h) concerns a right concerning confidentiality, and the right afforded is "to request confidentiality in the criminal justice system. Upon the court's approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim's family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims' family members and witnesses."

[64] 2001 Picknally minority report, p. 2; 2001 minority report, p. 6.

The Committee also decided that requiring a list of the expert's publications would not be unduly burdensome. Experts who have produced articles are generally experienced witnesses who can be expected to keep or at least compile a list of their publications, even if not included in their resumes. This is a small price to pay to insure that a witness' expert testimony can be sufficiently tested by opposing counsel on cross examination.

f. Objection to requiring disclosure of identification procedures

[Re 14(a)(1)(A)(vii]

The 2001 Picknally minority report objects to mandatory disclosure of identification procedures, stating that many cases are not "wrong man" cases. In such cases, if there have been no identification procedures, this provision does not require the prosecution to do anything. Trial and appellate courts are perfectly capable of distinguishing between cases in which identification procedures were used and cases in which the witness identified a person without such procedures, such as in the case of an assault by the victim's roommate. But where identification is at issue and procedures have been used, the Committee believes they should be disclosed. It is true that unlike most of the other categories, discovery of identification procedures is one item not explicitly listed in the M.G.L. c. 218 sec. 26A; but we believe it is implicitly included as mandatory discovery in district court insofar as it fits the catch-all categories in that legislation requiring discovery of "any information to which the defendant is entitled" and "any material and relevant evidence." In Commonwealth v. Dougan, 377 Mass. 303, 316 (1979), the Court reversed a conviction with a holding that the defendant has right to voir dire on identification procedures outside the presence of the jury, because the due process right to fair identification procedures "would mean little if it did not carry with it the right to be informed of the details of any out-of-court identification, even if it were not used at trial". Massachusetts case law also affords the defendant a right to discover whether the witness previously failed to identify him.[65] Statements made in connection with such procedures would also be covered by the mandatory category of "statements of persons."

g. Objection to defense discovery of whether the case involved government interception of certain communications, or whether any percipient witness was a government informant.

[Re 14(a)(1)(A)(ix)]

The minority reports object to a provision requiring the prosecution to reveal whether wire or oral communications of the defendant, or of someone that are relevant or material to the case, were intercepted; and whether any percipient witness is a government informant whose identity and/or location is claimed to be privileged from disclosure.[66] (The Picknally minority report misconstrues this as a rule "requir[ing]

[65] Commonwealth v. Clark, 378 Mass. 392, 403 (1979).

[66] 2001 Picknally minority report, p. 3-4; 2001 Hunt minority report, pt. 9, pp. 9-11.

prosecutors to reveal the identity of an informant."[67])The Committee was evenly divided on whether to adopt this provision, and voted to refer it to the SJC without endorsement for its consideration. Consequently, we argue neither for nor against that provision here.

h. Comments seeking longer timetable delivering reciprocal discovery to the prosecution

[Re 14(a)(1)(B)]

Josephine Ross, a clinical professor at Boston College Law School, submitted a comment asking that prosecutorial discovery be due "three weeks before trial, but in any event, not less than seven days after [discovery to the defense] is complete." A comment from Hilary Farber, a clinical professor at Suffolk Law School, asked that the defense not be required to provide discovery to the prosecution until 14 days before trial. Both argued that the defense needed that time to plan the case before discovery should be due to the prosecution. The Committee declined to adopt these suggestions, inserting instead that the deadline would be set by the parties, or in the absence of agreement by the court. The prosecution has a strong interest in receiving discovery in sufficient time to use it to thoroughly prepare the case. Moreover, both parties may continue to investigate, obtain evidence, and plan the case after the initial discovery deadlines, turning over later-obtained evidence at that point.

i. Objections to Notice of Alibi and Notice of Lack of Criminal Responsibility

[Re 14(b)(1), 14(b)(2)]

The Picknally minority report at 6 objects that (1) provision (b)(1)(F) gives the defendant a right to withdraw notice of alibi and preclude its use by Commonwealth; (2) provision 14(b)(1)(B) does not provide a deadline for the defense to provide notice of alibi; and (3) provision (b)(2) does not include notice of diminished capacity defense. (The Hunt minority report concurs on the last point at 11.) Whatever the merits of these objections, they are no argument against the revisions that *have* been proposed, as both the current rule and the proposed rule are identical in these 3 respects. The proposed rule does not institute these policies, which were incorporated in the Rule more than two decades ago.

The Advisory Committee voted to revise general discovery procedure, but leave the provisions relating to notice of alibi and lack of criminal responsibility alone at this stage (except for changes designed to make the language gender-neutral). The general discovery provisions in 14(a) were deemed in need of major, expeditious revisions in order to conform to legislative and caselaw requirements that have emerged since 1979; but to our knowledge, none of the "special procedures" provisions in 14(b) are inconsistent with existing caselaw.[68] Thus no revision is required to reconcile the rule

[67] 2001 Picknally minority report, p. 3.

[68] The Picknally minority report, at 6, cites *Commonwealth v. Rivera,* 425 Mass. 633 (1997), as invalidating section 14(b)(1)(F)'s prohibition on using a notice of intent to defend by alibi later withdrawn. *Rivera* did not discuss that issue because (1) the objection asserted on appeal had not been raised at the trial, so the

with existing legal requirements, and any changes would be dictated by the Committee's policy judgments. In any event, these special procedures are self-contained, and if requested by the Court or urged by its own members, the Committee can consider the 14(b) provisions in the second phase of its work, which will review other provisions in the rules that are unrelated to the general pretrial structure proposed -- as is 14(b).

j. Comment that discovery rule should include preservation of turret tapes

Hilary Farber, a clinical professor at Suffolk Law School, submitted a public comment in which she askedhat subsection (a)(1)(E) include preservation of turret tapes. The Committee considered this issue at length and rejected it on grounds of practicality.

k. Claim that the proposed definition of "witness statement" is over-inclusive

[Re 14(d)]

Definition (d)(1) defines "statements" which have been written by the percipient witness himself or herself. Definition (d)(2) defines "statements" which have been contemporaneously recorded by someone other than the speaker or writer. The minority reports object to the proposed definitions because they delete the requirement that writings by witnesses be signed or otherwise adopted by the author.[69] In Commonwealth v. Lewinski, 367 Mass. 889, 901-903 (1975), the Court stated that without any showing of particularized need, a defendant was entitled to all "prior written statements of prosecution witnesses which are available to the prosecution and are related to the subject", and subdivided this into three categories of mandatorily discoverable statements: "any statement made by the witness and in some definite way approved by him, a transcript of a contemporaneous verbatim or substantially verbatim stenographic or other recording of an oral statement by the witness, and a written report consisting of a statement by the witness."

After consideration, the Committee continues to believe that the definition of written statements made by a witness should encompass *written* statements of a percipient witness which have not been formally adopted by the witness, and the third category in Lewinsky, although not without ambiguity, implies as much. Under 14(d)(1), these will have been written by the percipient witness himself, and under 14(d)(2), such statements must still be "a *substantially verbatim* recital of an oral declaration and which is *recorded contemporaneously* with the making of the oral declaration" (emphasis added). In both cases, such evidence is generally relevant at trial; for example, one need not show a prior statement was adopted as accurate and complete by the writer in order to admit and demonstrate its inconsistencies. Prior informal statements, not intended for

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case was reviewed only on a miscarriage of justice standard; (2) the issue concerned the use of an affidavit in support of a motion to suppress, and did not purport to address any of the many other kinds of statements that are barred from subsequent use, such as the one at issue here or a statement made in connection with a plea later withdrawn, and (3) even if it were on point, the opinion cannot possibly be read to imply that because the use of evidence by the prosecutor does not violate the constitution, it must be admissible per se and no exclusionary rules based on procedural or policy concerns can be applied.

[69] 2001 Hunt minority report, pt. 7, p. 8; 2001 Picknally minority report, p. 6.

court, are not only often admissible at trial but often more probative than formal signed statements in anticipation of litigation. On this view, if the police have taken a statement of a witness who will testify, it should be discoverable to the defense.

However, the Committee did revise its proposed definition in a different respect during the post-comment review. A comment by Attorneys Leone and Parks as representatives of the Attorney General's Office opposed proposed revision (d)(1) in its original form, arguing that the provision would require production of not just final reports by police officers, but every note whether or not the officer is satisfied it is accurate and complete. They argued that police now discard preliminary notes designed to aid memory rather than for completeness, and the new definition would require these to be produced. In response, the Committee agreed that it was unnecessary and burdensome to require that every rough draft of a report be turned over in addition to the final one. It revised the definition in 14(d)(1) to define statement as "a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report."

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PROPOSED RULE 14 -- PRETRIAL DISCOVERY

Rule 14. PRETRIAL DISCOVERY

(a) Procedures for Discovery.

(1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.[70]

(vi) All other material and relevant evidence, police reports, documents, statements of persons, photographs, tangible objects, intended exhibits, or reports of physical examinations of any person or of scientific tests or experiments.

(vii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(viii) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.

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[70] At the most recent meeting of the Committee, this subsection was revised pursuant to a suggestion in the 2001 Hunt Minority Report, which noted that the subsection inadvertently referred to a court discovery order. No such order is required under the automatic discovery rules proposed herein.

[*The Committee was evenly divided on whether to adopt the following proposed provision; it will be referred to the SJC without endorsement and with that information*:] (ix) A statement disclosing: whether wire or oral communications of the defendant have been intercepted; whether wire or oral communications relevant or material to the case have been intercepted; and whether any percipient witness is a government informant whose identity and/or location is claimed to be privileged from disclosure.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the Court, the Defendant shall permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(v)**,** (vi)**,** and (viii) which the defendant intends to use at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to use as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the Court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivision (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and preservation of evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(vii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it.. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The Court shall hear and rule upon the motion expeditiously. The Court may modify or vacate such an order upon a showing that preservation of

particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that**,** to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts**,** and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and

(a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect.

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition at the time of the alleged crime or criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime will be relied upon by expert witnesses of the defendant, the court, upon its own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his or her findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence

which is based upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

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PROPOSED RULE 14 – SHOWING REVISIONS AND DELETIONS:

KEY TO REPORTER'S CONVENTIONS

Original language = regular typeface
~~Strikethrough~~ = removed
~~*Strikethrough + italics*~~ = removed, but retained in substance by addition of text elsewhere in rule.
Bold = addition to rule

Rule 14. PRETRIAL DISCOVERY

~~(Applicable to Trials in the District and Superior Court)~~

(a) Procedures for Discovery.

(1) ~~*Mandatory Discovery for the Defendant*~~ **Automatic Discovery**.

(A) Mandatory Discovery for the Defendant. ~~Upon motion of a defendant made pursuant to Rule 13, the judge shall issue an order of discovery when the requested information is relevant and consists of:~~ **(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:**

~~(A)~~ **(i)** Any written or recorded statements**, and the substance of any oral statements,** made by the defendant ~~*within the possession, custody, or control of the prosecutor, or*~~ **or a co-defendant.**[71]

[71] We have included as mandatory discovery to the defendant his own oral statements and those of any codefendants. This discovery must be provided "as a matter of course to counsel for the defendant" according to Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975). See also Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933 (1983). Noting conflicts between caselaw and Rule 14, the Appeals Court has stated that "until and unless the possible variance between the rule and the cases is dealt with by

~~(B)~~ (ii) **The grand jury minutes, and** the written or recorded statements of a person who has testified before a grand jury**.**

(iii) Any facts of an exculpatory nature ~~*within the possession, custody, or control of the prosecutor;*~~

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses. The Commonwealth shall also provide this information to the Probation Department.[72]

(v) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2).[73] Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vi) All other material and relevant evidence, police reports, documents, statements of persons, photographs, tangible objects, intended exhibits, or reports of physical examinations of any person or of scientific tests or experiments.[74]

(vii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.[75]

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appropriate alteration or clarification of the rule itself, prosecutors should feel bound to comply with the broadest interpretation of the decided cases, possibly broader than the precise language of rule 14(a)(1)(A)." Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 30-31 (1982).

[72] Names and addresses of prospective witnesses, and their records, are denominated discretionary discovery in R. 14. However, the single trial legislation and caselaw provide for this information to be given as of right. Commonwealth v. Adams, 374 Mass. 722, 732 (1978). See also Commonwealth v. Ferrara, 368 Mass. 182 (1975)(defendant has confrontation clause right of access to juvenile records which indicate bias or interest, despite confidentiality of juvenile records under M.G.L. c. 119 s. 60). The S.J.C. has also stated that normally the state would be obligated on request to produce the federal "rap sheet" of witnesses to the defendant since they were available as a matter of course to the state but not the defendant. Commonwealth v. Donahue, 396 Mass. 590, 599 (1986).

[73] At the most recent meeting of the Committee, this subsection was revised pursuant to a suggestion in the 2001 Hunt Minority Report, which noted that the subsection inadvertently referred to a court discovery order. No such order is required under the automatic discovery rules proposed herein.

[74] These items were originally "discretionary discovery" except for "photographs and tangible objects", which we have borrowed from Fed R Crim. P. 16, and "police reports and intended exhibits." Under the single trial legislation, R. 14's discretionary discovery was made mandatory in District Court.

[75] Commonwealth v. Dougan, 377 Mass. 303, 316 (1979)(reversed with orders that defendant has right to voir dire on identification procedures outside the presence of the jury, because the due process right to fair identification procedures "would mean little if it did not carry with it the right to be informed of the details of any out-of-court identification, even if it were not used at trial"). But see Commonwealth v. Farnkoff, 16 Mass. App. Ct. 433, 442-45 (1983)(Dougan inapplicable because no pretrial agreement for production of identification information from Commonwealth nor challenge to identifications). Massachusetts caselaw also affords the defendant a right to discover whether the witness previously failed to identify him. Commonwealth v. Clark, 378 Mass. 392, 403 (1979).

(viii) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.[76]

[*The Committee was evenly divided on whether to adopt the following proposed provision***:] (ix) A statement disclosing: whether wire or oral communications of the defendant have been intercepted; whether wire or oral communications relevant or material to the case have been intercepted; and whether any percipient witness is a government informant whose identity and/or location is claimed to be privileged from disclosure.**

~~*The discovery of any grand jury minutes ordered pursuant to this subdivision shall be limited to those which have been recorded and stenographically transcribed. The judge may in his discretion order grand jury minutes to be transcribed.*~~[77]

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the Court, the Defendant shall permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(v) and (vi) which the defendant intends to use at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to use as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the Court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivision (a)(1)(A)(iv)

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[76] *See* Commonwealth v. Johnson, 21 Mass. App. Ct. 28, 40-41 (1985)(must disclose implicit quid pro quo regarding pending charges even if no explicit promises); Commonwealth v. Paciuti, 12 Mass. App. Ct. 833, 838-39 (1981)(prosecutor should have disclosed evidence that witness was in protective custody and receiving living expenses). Caselaw has held that even if there is no quid pro quo by which consideration is given in return for testimony, any material understanding or agreement between the government and a key government witness or his attorney must be revealed. California v. Trombetta, 467 U.S. 479, 485 (1984)(witness plea agreements must be disclosed); Commonwealth v. Gilday, 382 Mass. 166, 175-76 (1980)(promise to witness' attorney not known to witness must be disclosed); Commonwealth v. Collins, 386 Mass. 1 (1982)(new trial required when a government witness was offered a plea bargain which had nothing to do with testimony in the trial, because the excluded evidence might have created reasonable doubt; "we are aware of the effect that any inference of prosecutorial favoritism might have on a jury's estimation of a witness' credibility."

[77] Retained but transferred to subdivision (a)(1)(A)(ii).

within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and preservation of evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(vii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The Court shall hear and rule upon the motion expeditiously. The Court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means. [78]

(2) **Motions for Discovery.** ~~Discretionary Discovery~~. The defendant **may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).** ~~Upon motion of a defendant made pursuant to Rule 13, the judge may issue an order of discovery requiring that the defendant be permitted to discover, inspect, and copy any material and relevant evidence, documents, statements of persons, or reports of physical or mental examinations of any person or of scientific tests or experiments, within the possession, custody, or control of the prosecutor or persons under his direction and control. The judge may also order the production by the Commonwealth of the~~

[78] According to the recent case of Commonwealth v. Wanis, 426 Mass. 629 (1988) law enforcement agencies not directly involved in the prosecution or investigation of the case are not automatically subject to orders issued to the prosecution. In such cases, Wanis requires that court orders must be addressed to the agency itself. Similarly, private parties will not be subject to discovery orders to the prosecution. This provision only covers such information known to the prosecutor without requiring further inquiry, but as to that information it insures that the defendant have the knowledge and ability to insure that important evidence cannot be lawfully destroyed. (It also provides the Commonwealth with the same right to move for preservation of evidence.) For example, a store videotape, or police turret tapes, may include potential evidence identifying an assailant which would be extremely probative but such tapes are routinely erased. The consequence, at worst, may be a miscarriage of justice; and to guard against that, the Supreme Court has mandated a Hobson's choice when potentially exculpatory evidence has been destroyed: "when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing...the State's most probative evidence." California v. Trombetta, 467 U.S. 479, 486-87 (1984). See also Commonwealth v. Henderson, 411 Mass. 309 (1991)(dismissal warranted when police notes of victim's description destroyed); Commonwealth v. Sasville, 35 Mass. App. Ct 15 (1993)(government's duty to preserve, but not conduct potentially exculpatory blood test on, aborted fetus of alleged rape victim). This provision is designed to avoid each of these three undesirable alternatives. By notifying counsel of the existence of such evidence, it also permits counsel to seek to obtain the evidence by subpoena.

~~names and addresses of its prospective witnesses and the production by the probation department of the record of prior convictions of any such witness.~~

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

~~*(3) Reciprocal Discovery*~~

~~*(A) If the judge grants discovery or inspection to a defendant pursuant to subdivision (a)(2) of this rule, the judge may, upon motion by the Commonwealth, condition his order by requiring the defendant to permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(2) which the defendant intends to use at trial, including the names, addresses, and statements of those persons whom the defendant intends to use as witnesses at trial.*~~

~~*(B) Notwithstanding the defendant's failure to file a motion for discretionary discovery under subdivision (a)(2) of this rule, the Commonwealth may within the time allowed by subdivision (e) of this rule, file a motion for delivery of those materials discoverable pursuant to subdivision (a)(3)(A) of this rule. The judge shall condition his order by requiring that the Commonwealth make those materials discoverable under subdivision (a)(2) of this rule available for inspection and copying by the defendant.*~~

(4) Continuing Duty. If either ~~*party*~~ **the defense or the prosecution** subsequently learns of additional material which ~~*he*~~ **it** would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, ~~*he*~~ **it** shall promptly notify the other party of ~~*his*~~ **its** acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or ~~*his*~~ **its** attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or ~~*his*~~ **the attorney's** legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. **This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.**

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision ~~(c)~~ **(a)(2)** of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his **or her** intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom ~~he~~ **the defense** intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. **Within seven days of service of the defendant's notice of alibi,** ~~the time allowed by subdivision (c) of this rule~~, the Commonwealth shall serve upon the defendant ~~or his attorney~~ a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or ~~his~~ **its** attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify ~~in his own behalf~~.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not

admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect.

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, ~~he~~ **the defendant** shall, within the time provided for the filing of pretrial motions by Rule 13**(d)(2)** or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his **or her** mental condition at the time of the alleged crime or ~~as to his~~ criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his **or her** mental condition at the time of ~~or as to his~~ **, or** criminal responsibility for**,** the alleged crime will be relied upon by expert witnesses of the defendant, the **court** ~~judge~~, upon ~~his~~ **its** own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his **or her** own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecut~~or~~**ion** or anyone acting on ~~his~~ **its** behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his **or her** findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his **or her** mental condition at the time of, or ~~his~~ criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify ~~in his own behalf~~ or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his **or her** mental condition at the time of, or ~~as to his~~ criminal responsibility for, the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the ~~judge~~ **court** may, if feasible**,** at such time as ~~he~~ **it** deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the ~~judge~~ **court** may prescribe such remedies as ~~he~~ **it** deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the ~~defendant~~ **defense** on the issue of ~~his~~ **the defendant's** mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, ~~he~~ **the defendant** shall, within the time provided for the filing of pretrial motions by Rule 13**(d)(2)** or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued pursuant to this rule, the ~~judge~~ **court** may make a further order for discovery, grant a continuance, or enter such other order as ~~he~~ **it** deems just under the circumstances.

(2) Exclusion of Evidence. The ~~judge~~ **court** may in ~~his~~ **its** discretion exclude evidence for noncompliance with a discovery order issued pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, **other than drafts or notes that have been incorporated into a subsequent draft or final report**~~, signed or otherwise adopted or approved by such person~~; or

(2) a **written,** stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration**.**[79]

~~(c) Time Requirements. (1) District Court.~~

~~(A) Discovery by the Prosecution. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (a)(3)(B) of this rule shall be filed and heard at a time set by the judge. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.~~

~~(B) Discovery of Alibi Defense. If a pretrial conference is ordered, the motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be filed and heard at a time set by the judge, that time to be not less than five days before trial. If no pretrial conference is ordered, the motion of the Commonwealth shall be filed and marked up for hearing not less than five days before trial or within such later time as the judge may allow.~~

~~The notice filed by the defendant in response to the motion shall be served upon the Commonwealth not more than two days after motion or at such later time as the judge may allow.~~

~~(2) Superior Court. (A) Discovery by the Prosecution. The Commonwealth may, within seven days after the expiration of the time allowed for the filing of pretrial motions under Rule 13 or within such other time as the judge may allow, make a motion for discovery under subdivision (a)(3)(B) of this rule.~~

~~(B) Discovery of Alibi Defense. The motion of the Commonwealth for discovery of material under subdivision (b)(1) of this rule shall be made not less than twenty-one days prior to trial or within such other time as the judge may allow. The notice filed by the defendant in response shall be served upon the Commonwealth not more than seven days after filing of the motion or at such other time as the judge may allow. The notice by the Commonwealth in response to the defendant's notice shall be served upon the defendant~~

[79] See Commonwealth v. Gilbert, 377 Mass. 887, 892 n. 4 (1979), citing Commonwealth v. Lewinski, 367 Mass. 889, 902 (1975). Compare Campbell v. United States, 373 U.S. 487 (1963)(interpreting the federal Jencks Act, the Supreme Court finds that an FBI agent's dictation of an interview report based both on his notes and memory was a producible "written witness statement") with Palermo v. United States, 360 U.S. 343, 351-53 (1959) (interpreting Jencks Act, "statements" includes more than automatic reproductions of oral statements but excludes interviewer's selective though accurate report prepared from the author's memory of a lengthy oral recital).

~~within seven days after receipt of the defendant's notice or within such other time as the judge may allow.~~

RULE 34 – REPORT

Summary and Explanation of Revisions

The single trial legislation included G.L. ch. 218, secs 26A and 27A(g), applicable to judge and jury sessions respectively, which hold that "review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court." But as currently formulated, Rule 34 only permits judges in Superior Court and District Court jury sessions to report a question of law to the Appeals Court, barring judges at the District Court primary session from doing so. In order to encompass all judges and comply with the single trial legislation, the Committee voted to eliminate the caption restricting its application to "Superior Court and jury trials in District Court". In addition to elimination of the caption, the Committee and Reporters agreed that the Reporter's Notes should underscore (as Proposed Rule 1 and M.G.L. c. 218 sec. 59 provide) that Rule 34 applies to all the trial courts, including the Juvenile Court.

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Rule 34. REPORT

~~(Applicable to District and Superior Court)~~

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

ELIMINATION OF SUBCAPTION TO ALL SUBMITTED RULES

Each rule submitted currently has a subcaption indicating to which courts the rule applies. For example, most of the rules have the subcaption, "Applicable to District Courts and Superior Courts."

Because the proposed rules clearly indicate any differences in procedures in the two courts within the rules, there is no need to maintain these captions. For example, Rule 5, governing Grand Jury proceedings, carries the subcaption "Applicable to Superior Court", but need not because the content of the Rule specifies that the grand jury is a creature of the Superior Court. Moreover, Proposed Rule 1(b) indicates the scope of coverage -- they govern the procedure in criminal and delinquency cases in both courts, delinquency proceedings in Juvenile Court, and proceedings for post-conviction relief as permitted by the general laws. Therefore our proposals specify coverage within the rule as necessary and delete the subcaption in all cases.

GENDER NEUTRALITY

Existing rules often use male pronouns to refer to the judge, counsel, parties, etc. All rules have been rewritten to use gender neutral language.

PROPOSED EFFECTIVE DATE

The Committee recommends that the proposed Rules, if promulgated, become effective six months after adoption. The Committee also believes that the new rules should apply only to those cases *initiated* (by indictment or complaint) after the effective date. This would permit sufficient time for dissemination, for educational programs on the changes in practice mandated by the rules, and for court and prosecution staffs to devise institutional procedures to efficiently implement the rules.

PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE

COMMITTEE RESPONSES TO THE MINORITY REPORTS

May 14, 2003

1. The minority reports

Two members of the Standing Advisory Committee on the Rules of Criminal Procedure have filed a series of dissenting reports. These reports are as follows:

1. 1999 memorandum of Pamela Hunt & 1999 memorandum of Carmen Picknally

   These two reports were submitted to the SJC Rules Committee in opposition to the release of Proposed Rule 14 for public comment.

2. 2001 minority report of Pamela Hunt & 2001 minority report of Carmen Picknally

   These two minority reports were submitted to the SJC Rules Committee in opposition to provisions in Proposed Rule 14.

3. 2003 minority report of Pamela Hunt

   This minority report includes the member's dissent from provisions in Proposed Rules 3, 7, 11, 12, and 13

4. 2003 supplement to minority report of Pamela Hunt & 2003 supplement to minority report of Carmen Picknally

   These two "supplements" were distributed to the Committee at the meeting scheduled for vote on whether to approve the draft submission to the SJC Rules Committee. They supplement the 2001 minority reports on Proposed Rule 14.

2. Responses to the above reports

As to the memoranda numbered 1, 2 and 3 above, the Committee has provided its responses in its "Final Submission and Report." Following a "Summary and Explanation of Revisions" to a particular rule, the submission contains a section (where applicable)

entitled "Major issues raised in public comments and minority reports, and Committee responses."

As to the 2003 "Supplements" numbered 4 above, which concern Proposed Rule 14 and which were provided to the Committee at the meeting at which it approved the "Final Submission and Report", the Committee asked the Reporters to prepare a response in so far as the points in the Supplements had not been raised and addressed previously. The Reporter's response is as follows:

1. The 2003 Hunt Supplement, paragraph # 1, notes that G. L. c. 218, sec. 26A changed discovery requirements for the district courts. It says that "current Rule 14 and sec. 26A have existed together for a period of time with no confusion or difficulty." However, Rule 14 and sec. 26A are entirely at variance with each other – almost all of the "mandatory" discovery under the legislation is "discretionary" discovery under existing Rule 14 -- and it is unthinkable that a major revision to Rule 14 would not reflect the contrary legislative requirements.

The Supplement goes on to say that even if Rule 14 should be changed with regard to district court discovery, it should remain unchanged for Superior Court. This would create the odd result that far less discovery would be mandated in the more serious cases. Moreover, neither the Supplement nor the minority reports provide any reason why the amount of discovery required should be different in the two courts.

Finally, the Supplement argues that "the legislature made a specific choice that those discovery requirements outlined in the statute should only apply in District and Municipal Courts." However, there is little reason to believe that the legislature considered what degree of discovery should exist in superior court. Rather, sec. 26A was part of a complex of legislation which eliminated trial de novo in the district court and created a new single trial system. If anything, the legislature concluded that the mandatory discovery requirements it included in sec. 26A was appropriate to the single trial system it was creating for district court. Absent some argument to the contrary, one would expect that had the legislature been addressing the superior courts (also a single trial system), it would have imposed the same discovery system there. Indeed, Standing Order 2-86, adopted by the Superior Court, seeks to emulate the district court legislation by making most of rule 14's "discretionary discovery" mandatory in superior court as well.*

For additional arguments in response to related assertions in the initial Minority Reports, see the Final Report and Submission at pages 91-92.

2. The 2003 Hunt Supplement, paragraph # 2, argues against Proposed Rule 14's sequence of discovery. The proposed rule makes reciprocal discovery to the prosecution

* Sup. Ct. Standing Order 2-86, Part II, provides that a discovery package is to be provided to the defendant at arraignment which includes: copies of all discoverable police reports, copies of written statements of the defendant and witnesses available to the prosecutor, copies of scientific reports and other documentary evidence available to the prosecutor, an opportunity to examine photographs and real evidence, and the Grand Jury minutes.

mandatory and automatic, unlike the current rule which leaves it to the court's discretion; but it requires that the prosecution provide its discovery to the defense first, after which the defense must provide its discovery to the prosecution. The Supplement argues that discovery to both sides should be simultaneous.

The Committee believes that proposed Rule 14's two stage sequence best comports with the constitutional framework that allows for prosecutorial discovery, as enunciated in the two major Supreme Court cases on the subject. The first case, Williams v. Florida, 399 U.S. 78 (1970), found prosecutorial discovery constitutional so long as it was limited to evidence *the defendant intends to introduce at trial*. As the court explained, when so limited prosecutorial discovery merely advances the timing of the defendant's decision about whether to waive her privilege against self incrimination by producing evidence. However, a prosecutorial discovery rule that reached beyond evidence intended for trial *would* violate the privilege. *Id.* at 84-86.

Quite obviously, the defendant cannot be expected to waive the privilege and make a knowledgeable decision as to what evidence to introduce without some knowledge of the case against her. The decision whether to present a case or remain silent, and the decision whether to use particular items of evidence that may both help and hurt the defendant, can only be made in relation to the strength of the prosecution's evidence. *Williams* said as much in finding that pretrial disclosure of an alibi, and initial disclosure of an alibi at trial, were equivalent constitutional waivers because

> the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control *and the strength of the State's case* built on these facts. *Id.* at 85. (emphasis added)

The Committee therefore believes that the constitutional framework enunciated in *Williams* can only be effectuated if the defense is aware of the strength of the prosecution's case when making her decision. Thus Proposed Rule 14 requires the prosecution to provide discovery first, followed by the defendant.

Moreover, the other major Supreme Court case, Wardius v. Oregon, 412 U.S. 470 (1973), reversed a conviction because the defendant was required to provide notice of alibi with no assurance that the prosecution would provide discovery to the defense. *Id.* at 472. As the Court noted, although Oregon might have required discovery to the defense (which was not mandatory by statute), the defendant would not have been able to "retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights [to the defense] were not granted." *Id*. at 477-78. Requiring the prosecution to provide discovery first helps assure against the reversible error which could occur in a simultaneous scheme if the defendant, but not the prosecution, provided all discovery due.

3. The 2003 Hunt Supplement, paragraph 4, argues against Proposed Rule 14(a)(1)(E)(i), which states that if the prosecution learns that items are possessed by persons or entities outside the prosecution team but that would be subject to discovery if

possessed by the prosecution, it must notify the defense of the existence of the item and its location if known. The Hunt Supplement argues that this provision risks destroying the prosecutor's good relationship with its witnesses. The Committee, however, thought this provision to be a modest but important method of assuring that evidence relevant to the case be available to both parties. This provision is limited to evidence of which the prosecution is already aware, and since such evidence could help determine the jury verdict, the defense should know of its existence and be able to take steps to preserve it against destruction. The provision is modest because there are (1) no obligations upon the prosecutor to inquire or otherwise search for third party evidence, (2) no obligations upon the prosecutor or third party to convey or allow inspection of the evidence by the defense, and (3) no obligations to preserve the item absent a successful motion before the court. The burdens regarding potentially important evidence are thus minimal.

As to the assertion that the prosecutor should not be "placed in the middle," we note that third parties with evidence are not the "clients" of the prosecutor, and even in the far stronger case of the attorney-client relationship (such as a defendant and her attorney), rules of professional responsibility rightly place obligations on attorneys to do things that may disappoint their clients. (For example, the client's relationship with her attorney may be strained by obligations not to suborn perjury, to assess client competency, to inform on planned frauds or crimes, etc., but such rules serve the interests of justice.) Likewise, proposed subsection 14(a)(1)(E)(i) serves vital interests of justice by assuring a fair trial in which the defense knows of relevant evidence already known to the prosecution, and can take steps to preserve it when deemed necessary. Just as the prosecution may disappoint third parties by summonsing them to trial because their evidence is important to the Commonwealth, it may occasionally have to disappoint third parties because their evidence is important to the defense.

Further aspects of rule 14(a)(1)(E) raised in the Supplement were also raised in the 2001 Minority Reports and are addressed in the Final Report and Submission at pages 84-85.

4. The 2003 Picknally Supplement argues that a particular concern of prosecutors is that their discovery compliance could be "subject to possible BBO sanctions for a discovery mixup" because it must file a certificate of compliance after conveying the discovery it owes. The Committee believes that requiring a certificate of compliance could significantly reduce the number of discovery disputes that afflict trial courts, and also reinforce the seriousness of the discovery obligations. With regard to the Supplement's concern, we note that (1) the certificate requirement is imposed not only on the prosecutor but also on the defense, which under the proposed rule now has mandatory discovery obligations to the prosecution for the first time; (2) the certificate simply restates what is required in any event under both the existing rule and the proposed rule, and (3) no party acting in good faith need worry about discipline for a "mixup." Bad faith is required, because the certificate does not assert that all required discovery had been produced, but rather that "*to the best of its knowledge* and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts..." (emphasis added). The rule also explicitly anticipates that

subsequent investigation may reveal additional discoverable items; it does not require a party to complete its investigation before the initial discovery deadline.

5. The Picknally Supplement, p. 1, objects to discovery item (A)(i), which includes the substance of oral statements of the defendant or a co-defendants. It argues that a prosecutor cannot and should not have to "discover and turn over everything a defendant and a co-defendant said to the police or any witness." But the rule does not require the prosecutor to convey defendant statements to third party witnesses when she is unaware of such statements, nor does it require turning over any statements not relevant to the case; both situations are explicitly outside the scope of discovery defined in proposed rule 14(a)(1)(A). As to oral statements made to the police or members of the prosecution team that *are* relevant to the case, these indeed must be conveyed to the defendant under rule 14(a)(1)(A)(i) – as is *already required* under the existing caselaw.[*]

6. The other issues raised in the 2003 Supplements reiterate points made in the 2001 minority reports, and thus have been responded to in the "Final Submission and Report." These issues, and the page in the final submission containing the response, are:

a. The Picknally Supplement at page 1 argues that the categories of discovery required under the proposed rule are too vague to give guidance as to what is required of prosecutors – despite the fact that these categories are in large part identical to the discovery categories required in district courts under M.G.L. c. 218, sec. 26A, to the "discretionary discovery" categories in present rule 14(A)(2), and to the categories one finds in typical motions filed in superior courts. For the Committee's detailed response, see the Final Report and Submission at page 74, number 2; page 91, number 17(b); and pages 92-93, number 19a. Regarding the asserted vagueness or other defects of particular items named in the Supplement and not addressed elsewhere in this response, see Final Report and Submission at pages: 87 number 14 ("material and relevant evidence"); and 94-95, number 19d (dates of birth of witnesses, including police witnesses).

b. The Picknally Supplement at page 2 argues that the proposed rule is inefficient because there must be a written waiver to extend discovery deadlines, whereas currently extensions are by informal agreement between the parties. Proposed Rule 14(a)(8) allows the parties to efficiently change discovery requirements by unilateral waiver *or* by

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[**] *See, e.g.,* Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982); Commonwealth v. Howard, 8 Mass. App. Ct. 318, 320 (1979). In *Lapka,* the court stated that prosecutors should, "as a matter of course, make disclosure of the substance of oral statements of a defendant when they deliver the written statements of their witnesses. We also expect that police personnel will not frustrate such disclosures by delaying reduction to writing of defendants' oral admissions. . . . Prosecutors who fail to comply will run the risk that any non-disclosure may be found to be a prejudicial violation of rule 14, resulting in possible mistrial, and they may also invite disciplinary sanctions." *See also* Commonwealth v. Gilbert, 377 Mass. 887, 892–94 (1979); Commonwealth v. Blaikie, 375 Mass. 601, 606–08 (1978) (mistrial for nondisclosure pretrial of oral statement cured prejudice); Commonwealth v. Lopes, 25 Mass. App. Ct. 988, 989 (1988); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933 (1983) (defendant entitled to all oral statements, but because prosecutor did not discover statement existed until just before trial, his notice to defendant at that time was adequate to alert defense).

written agreement, without motion or court action, as discussed in the Final Submission and Report at pages 86 number 13.

c. The Picknally Supplement at p. 2 argues that it will take "decades of litigation to return to the level of certainty" regarding discovery that we have in present Rule 14. For the Committee response, see the Final Report and Submission at page 87 number 14.

d. The Hunt Supplement at p. 2 argues that the definition of "witness statement" in present rule 14 be retained, especially because work product must be protected. Nothing in the definition in proposed rule 14(d) would remove any degree of protection from writings that constitute work product. Work product continues to be protected under proposed rule 14(a)(5), and the parameters that have been enunciated by caselaw would continue to apply. The Committee's more detailed response to the 2001 minority reports' objections to the definition of "witness statement" can be found in the Final Report and Submission at page 98, number 19k.

Respectfully submitted,

Eric D. Blumenson, Reporter

For, and delegated by, the
Standing Advisory Committee on the Rules
of Criminal Procedure

May 14, 2003

cc.: *The Standing Advisory Committee on the Rules of Criminal Procedure*

Hon. Charles Hely, *Chair* (2003 - present); Hon. Daniel F. Toomey, *Chair* (1995 - 2002);

Currently Active Committee Members: Liilian C. Andruszkiewicz; Hon. Jay D. Blitzman; Hon. Phillis J. Broker' James J. Foley, Jr.; Andrew Good; Daniel J. Hogan; Pamela L. Hunt; Hon. Diane M. Kottmyer; William J. Leahy; Arthur B. Leavens; Hon. Robert F. Murray; Carmen W. Picknally; Hon. Howard J. Whitehead; Gary D. Wilson; Enoch O. Woodhouse, II; Lena M. Wong.

Robert Bloom, *Liason with the Supreme Judicial Court Rules Committee*

Eric Blumenson, *Reporter*

David Rossman, *Deputy Reporter*

MINORITY REPORT TO THE RECOMMENDATIONS OF THE STANDING ADVISORY COMMITTEE ON CRIMINAL RULES

To the Justices of the Supreme Judicial Court, the Chair and Members of the Standing Advisory Committee on the Criminal Rules and the Reporters

It is with utmost respect to my fellow members of the Committee and to the Reporters, and with full recognition of the months and years of work that went into the Recommendations that the Committee is transmitting to the Court, that I submit this Minority Report. I believe that it is important for the Court to be fully aware that many of the recommendations do not reflect a consensus of the Advisory Committee, and that there remain strongly held views that many of the recommendations are neither wise or necessary, may be driven in some cases by what I believe to be a misreading of the law, and in many situations are not practicable. I have submitted a separate Minority Report on Rule 14, and thus will here focus on several of the other proposed Rule changes that cause particular concern.

An initial comment should be made concerning the matter of the relationship between the current District and Municipal Court Rules of Criminal Procedure, generally known as the one-trial rules, and the proposed amendments to the Rules of Criminal Procedure. I believe the Committee would expect that the one-trial rules would be repealed upon the effective date of any changes to the Criminal Rules, at least where there are differences between them. It is clear, however, that the Committee intended for the most part to take those rules, and the one-trial practice and

procedures described by the legislature for the District and Municipal Courts, and apply them to the Superior Court as well.

This Court should recognize that there was good reason that the legislature did not extend the one-trial procedures to the Superior Court. The nature and complexity of the cases is very different in the various divisions of the Trial Court. What works well for District Court practice simply does not easily transfer to Superior Court practice. This was recognized by the Court twenty-five years ago when it enacted the current Criminal Rules, with different provisions for the two systems where practice and practicality dictated it. Since then, faced with the abolition of the de novo system, the District and Municipal Courts had a unique opportunity to create a set of rules, practices and procedures that would work for the their Courts and which would incorporate the legislation's provisions on applicable points. The Rules those Courts devised have been in effect about 7 years, and there is no sense that they do not work well for those Courts or that any change is needed.

The Criminal Rules do need updating and certain provisions modified to reflect subsequent legislative and other change, but I respectfully differ from the majority of the Committee's view that the Criminal Rules in all respects should impose similar practices, procedures and timeframes on cases with very different degrees of complexity. The Rules should be practicable and workable, giving guidence, but being responsive to the reality of practice. Many of the Comments in this Minority Report, and in the Minority Reports on Rule 14, concern the impact of the proposals to extend many current District and Municipal Court procedures to the Superior Court.

Rule 3

A. Probable Cause Hearing and the Right to Indictment

The current rule may be confusing regarding the process for waiving indictment, but in addressing that issue,[1] the proposal in proposed Rule 3 (f) would seem to create a right to a probable cause hearing that would exist unless the Commonwealth indicts the case prior to the hearing date. Under current law the defendant's right is to indictment; there is no constitutional, statutory or common law right to a probable cause hearing prior to indictment, unless promised by the prosecution. If the proposed Rule seeks to make a marked change the law to create a "right" to a probable cause hearing or to set up a superior right to a probable cause hearing over the prosecutor's right to seek indictment, then the proposal should be rejected.

Given that most cases bound for Superior Court are directly indicted, it is important for the Rules to assure that the Commonwealth will in effect be able to exercise its right to seek a direct indictment, or that a judge will afford the Commonwealth sufficient time to present the case to the grand jury. There is nothing in the proposed Rules either in this Rule or proposed Rule 7 that provides for this assurance.

The grand juries of the various counties do not sit daily, or in some cases even

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[1]G. L. c. 276, § 38, specifically addresses the issue concerning waiver of indictment and election of a probable cause hearing, making specific reference to Rule 3, and approving the current procedure. Those references were added in 1985, after Rule 3 had been in effect for 6 years. Since the legislature has now "adopted" the provisions on waiver and election of probable cause hearing, there is serious question whether the Court can now substantially change them without legislative action.

weekly, and with busy schedules and heavy caseloads it is often difficult for a prosecutor to present a case to the grand jury within the short period of time the proposed Rules seem to contemplate.[2] It would be unfortunate to set up a system that would require expending the additional time and expense in requiring grand juries to sit more frequently in order to spare victims and witnesses the burden of testifying at probable cause hearings or to require the very busy district and municipal courts to hold these hearings. While having a probable cause date scheduled will operate as incentive to present a case to the grand jury and keep the case on track while it remains in District Court, there is no good reason to create a right to a probable cause hearing especially if there is a legitimate reason a case is not indicted by the anticipated hearing date. There are sufficient other provisions in the law to assure that a defendant charged or detained in District Court on a bail order is not unreasonably held prior to indictment.

The Committee's report (see commentary to Rule 7) relies on the statutory provision in G.L. c. 276, § 38, that probable cause hearings be held "as soon as may be" as reason for the belief that probable cause hearings must be scheduled and held without scheduling any intermediate dates. But there is nothing in the statutory

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[2]In Barnstable/Dukes/Nantucket the grand jury usually sits as needed on Tuesday every other week. In Berkshire, it is scheduled as needed. The Bristol grand jury sits some days during the second and fourth week of the month. The Essex grand jury sits every Wednesday. In Franklin it sits every other Friday, In Hampshire, every other Tuesday. Hampden grand juries sit on Tuesdays, Wednesdays and Thursdays. In Middlesex County the grand jury sits every Tuesday and Thursday in Cambridge and every Wednesday in Lowell. In Norfolk, the grand jury sits every Wednesday. It sits every Friday in Plymouth County. The Suffolk County grand jury sits Monday through Thursday of every week. The Worcester grand jury sits on days during the first two weeks of every month.

language (or in any case interpreting § 38) that probable cause hearings be held "as soon as may be" to suggest that they must be held without consideration of circumstances surrounding reasonable evaluation and presentation of cases to the grand jury.

Currently, the district and municipal court judges understand these concerns and generally accommodate to the realities of the system. To assure that there is no belief that the proposed Rule change is intended to signal a change in the law or create new rights, this should be said directly in the Rule or in the Reporter's notes and the Rule itself should contain specific language that gives the court the authority to consider the complexity of the case and the authority and ability of the prosecutor to present the case to the grand jury in either setting a probable cause date, or in entertaining continuances of that hearing date.

In any complex case; in a case where immunity is sought; where the grand jury seeks a lineup, handwriting exemplar, hair or blood sample, or where there is objection to a subpoena, and other time-consuming circumstances, grand jury proceedings cannot be concluded in short course. Yet, it is with these cases that it makes sense to continue the case in district court, and await the grand jury's determination of probable cause. Even when an indictment has been obtained, but there has not been an arraignment in Superior Court, current practice understands the necessity of continuing the probable cause hearing, as by returning an indictment the grand jury has found probable cause and there would be no grounds to hold an individual or justify a bail order were the complaint to be dismissed in District Court. Superior Court arraignment and setting of bail are necessary before a district court complaint can be dismissed or

nol prossed. While the Committee's report (see commentary to Rule 7) notes there is no prohibition on granting continuances for probable cause hearing matters, if a "right" to a probable cause hearing is created unless there is a superceding indictment, it is not difficult to anticipate that unreasonable expectations will be placed on prosecutors to indict quickly.

It should also be noted that if the system is set up to force a prosecutor to quickly indict a case, it could work to the disadvantage of many defendants. The prosecutor simply needs time to evaluate the case and determine whether it should go to Superior Court or whether justice is better served by breaking the case down and proceeding in District Court. Breakdowns frequently occur, but the decision requires time for evaluation. In addition, every prosecutor's office has in some form a procedure for central office supervisory evaluation of requests for indictment, and before any case is presented to the grand jury, every case has gone through this screening process.[3]

In addition, the language in Rule 3 (f), although not intended, seems to indicate that unless probable cause is found for all the crimes charged in the complaint, the complaint shall be dismissed, and that a case cannot be bound over unless there is probable cause for all the crimes listed in the complaint. ("no probable cause to believe that the defendant committed the crime or crimes charged in the complaint.") Perhaps a better way to make the point is to indicate that those charges for which probable cause is found shall be bound over, and that only those charges for which probable cause is

[3]In the Attorney General's Office, for example, no case is presented to the grand jury without preparation of a detailed prosecution memorandum and specific approval by the supervisor, the Bureau Chief or Deputy, and the First Assistant Attorney General.

not found should be dismissed.

B. Issuance of Complaints

The Committee's report accurately indicates that there was considerable discussion on whether to require a written or recorded memorialization of the basis for a complaint, and that the Committee was closely divided on this point. Originally, the Committee operated under the assumption that a defendant does not have a right to challenge the sufficiency of evidence to support a complaint. See, e.g., *Commonwealth v. Baldassini*, 357 Mass. 670 (1970); *Commonwealth v. Cote*, 15 Mass. App. Ct. 229 (1983). After *Commonwealth v. DiBennadetto*, 436 Mass. 310 (2002), however, some members of the Committee believed that the Court has now authorized such challenges to the issuance of any complaint, and if that were so, judges needed to have written or recorded information of the factual basis for complaints in order to evaluate them. This belief formed much of the basis behind Rule 3 (g)(1).

Others of the Committee were of the strong view that the language in *DiBennadetto* permitting such challenges to complaints, would only apply in those cases where process has issued under G.L. c. 218, § 35A, following a show cause hearing where all the alleged crimes are misdemeanors, and where the defendant has not been arrested. The Appeals Court shares this view. *Commonwealth v. Rumkin*, 55 Mass. 635 (2002).[4] If that is so, there is no reason to provide a general rule applicable

[4] *Rumkin* determined that trial counsel was not ineffective for failing to challenge the sufficiency of probable cause supporting the complaint that issued after a warrantless arrest. Relying on Rule 2 (a) and (b) of the District and Municipal Court Rules of Criminal Procedure, the Court recognized the difference in cases where a complaint is

to all cases, and no reason to grant a new right of review of the issuance of criminal process other than where it has issued pursuant to § 35A. Rule 2 of the District and Municipal Court Rules of Criminal Procedure, as recommended by a committee of District Court judges, clerks and practitioners, was adopted in 1995 and has worked without confusion. It sufficiently describes workable procedures for issuing complaints.[5] The Rule of Criminal Procedure need not address procedures for issuance of complaints, especially if they differ from the District/Municipal Rules. Any further development of the law interpreting the scope of *DiBennadetto* should await case law.

It is one thing for the law to require that a complainant should present the information under oath and sign the application for complaint, or even to determine in some cases that the complainant's account should be presented in writing or recorded, and quite another thing to change longstanding law and grant an opportunity to challenge the factual basis for the complaint issuing. It is also one thing for the law to require that complaints or process issue only upon probable cause, and something very different to grant an right to challenge the issuance of the complaint or process by motion to dismiss.

The Committee's report clearly indicates that its proposal for Rule 3 (g)(1) does indeed contemplate an intent to afford all defendants an opportunity to challenge the

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issued after a warrantless arrest and cases in which process issues under G.L. c. 218, § 35A.

[5]The written record outlined in District/Municipal Criminal Rule 2 has the additional advantage of providing information on a case in which a defendant has defaulted and is brought to court after passage of considerable time.

sufficiency of any complaint by motion to dismiss prior to trial. This would be so even if the individual was arrested with a warrant, even if he or she had been arrested without a warrant or even if there had been a *Jenkins* hearing to determine probable cause for detention for more than 24 hours (see Rule 3.1). If the Court concurs in the choice to require a record, it should in some definitive way make clear that it does not grant a right to challenge the sufficiency of the showing in support of the application for complaint (except where there has been a show cause hearing in the circumstances outlined in DiBennadetto). To do otherwise would overrule longstanding precedent and make a marked change in law and practice. [6]

As the committee has not been made aware of the existence of any practice of defendants generally moving to dismiss complaints for insufficiency of probable cause

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[6] In *Commonwealth v. Baldassini*, 357 Mass. at 676-677, holding that arrest warrants, while requiring probable cause, do not have to be supported by a written determination of cause. This Court said:

"While both the United States and Massachusetts Constitutions require that arrest warrants be founded upon probable cause supported by oath or affirmation, neither Constitution requires that the facts constituting probable cause be recited in or be made a part of the complaint on which the warrant is issued. Massachusetts has provided by statute (G. L. c. 276, § 22, quoted above) how arrest warrants may be issued, and it has not required that the facts constituting probable cause be recited in the complaint or in any affidavit or other document. The complaints on which the warrants are based may be issued on the basis of oral testimony under oath. Moreover, the prescribed statutory forms of complaints and indictments listed in G. L. c. 277, § 79, do not require any recital of facts constituting probable cause. In contrast to these provisions, Massachusetts has expressly required by legislation [citation omitted] that the facts constituting probable cause for the issuance of search warrants be in the form of an affidavit signed and sworn to by the applicant for the warrant. To the same effect see Rule 41 (c) of the Federal Rules of Criminal Procedure (1946), 327 U. S. 863. The defendant in effect argues that these requirements for recording and documenting the facts constituting probable cause for the issuance of a *search* warrant be now applied to all complaints which may result in the issuance of an *arrest* warrant. As we have indicated, neither the *Giordenello* decision, nor any decision or law of this Commonwealth supports such a contention. Such a requirement would place an impossible burden upon law enforcement officers and upon those responsible for the administration of our criminal laws.[FN4] In view of the precise and adequate constitutional and statutory provisions on this subject in this Commonwealth, we decline to contribute to the further proliferation of opportunities for pretrial excursions and diversions from the merits of criminal charges."

since the *DiBennadetto* case, it appears that the Appeals Court's interpretation of that case and the District and Municipal Court Rules are generally accepted.

Rule 7

A. *Preservation Orders*

Proposed Rule 7 contemplates that at arraignment a party may move for an order to preserve evidence that is not subject to Rule 14 discovery, that is, not within the possession, custody or control of the prosecution or its agents on that case. The Committee's commentary, referencing proposed Rule 14 (a)(1)(E), seems to contemplate that the order may be entered at arraignment and later modified or vacated if appropriate. There is no objection to seeking preservation of evidence within the custody of the prosecution or its agents at this time because the prosecutor will be present at arraignment and can be heard. Defense counsel cal also signal the court an interest that evidence in the possession of third parties be preserved. But it is inappropriate for a court to enter orders that would run against third parties (which would include victims) without them having an opportunity to be heard. The interests of victims, witnesses and third parties cannot practically be considered at arraignment. Not only does it appear to run afoul of the Victim Rights Law, it also underscores the point that Rule 17 and its provisions for obtaining evidence and information in the possession of third parties should have been considered at the same time as Rule 14 and other provisions relating to third parties.

B. All Court Dates Set at Arraignment

While setting dates for pretrial conference and pretrial hearing at arraignment has advantages in requiring both counsel to attend to the case expeditiously and in the court keeping control of the docket, it must be recognized that frequently, especially in the Superior Court, those dates will not be realistic. In addition, in the District and Municipal courts it is often the case that counsel appearing at arraignment for both sides will not be handling the case beyond arraignment, as the committee recognizes in proposed Rule 7 (b). Succeeding counsel may already have scheduling conflicts for the scheduled dates by the time he or she gets the case.

C. Probable Cause Track

The proposed change to Rule 7, whereby cases bound for Superior Court would be scheduled for probable cause hearings with no intermediate dates, again appears to be premised on a notion that there is a statutory right to an expeditious probable cause hearing. See comments to Rule 3 above.

Rule 11

A. Elimination of Requirement to Discuss Potential Defenses at Pretrial Conference

It is simply unwise to eliminate the provision of Rule 11 that requires counsel to discuss possible defenses at the pretrial conference. The basis for this proposed deletion appears to be the reading of *Wardius v. Oregon* and *Williams v. Florida* that informed proposed Rule 14's provisions about the timing of reciprocal discovery. As

discussed in the Minority reports to proposed Rule 14, those cases do not concern the timing of discovery. Furthermore, under the current Rule, discussion of possible defenses, including alibi, lack of criminal responsibility, and license or authority, at an early stage would enable the parties to provide each other relevant discovery on these matters, or to file appropriate motions in a timely manner. For example, in a firearm possession case, knowing that the defendant may rely on a claim of license, or that a controlled substance case may be defended under authority of a valid prescription, would enable the Commonwealth to investigate such license or authority, provide relevant discovery about it and, if the proposed defense is found to be valid, dispose of the charge at an early point.

B. Setting a Trial Date or Assignment of a Trial Date

Given that the procedure proposed by the Committee would not permit the Commonwealth to obtain reciprocal discovery until after it files a certificate of compliance with its discovery obligations (a notion which has been discussed in the Minority Reports to Rule 14), there is nothing in Rule 11 to indicate that the Commonwealth must be afforded sufficient time before trial to seek and obtain reciprocal discovery, and then to file its own nondiscovery motions. While Rule 11 does not set up any timetable for scheduling the trial date, it should more directly acknowledge the Commonwealth's rights concerning discovery. G.L. c. 278, § 18, permits filing of nondiscovery motions in district court within 21 days of the decision on jury waiver, so presumably that much time would be available for the Commonwealth to seek discovery and file any motions. However, since proposed Rule 13 has altered the

time for filing nonevidentiary motions to “prior to assignment of trial date,” (see comments to proposed Rule 13 below), it is less than clear how much time would in fact be afforded the Commonwealth. Much of the confusion would be avoided were the Court not to adopt the recommendation that the Commonwealth may not seek discovery until it has provided all discovery itself, seek to have the Rules more consistent with statutory provisions, or not apply this to cases in the Superior Court.

C. *Defendant’s Decision on Waiver of Jury Trial*

In the District Courts, where jury sessions may not be located in every court, there is reason to not require the claim or waiver of jury trial until the defense has the information for an informed choice, and this is reflected in G.L. c. 278, 18. In reality, almost every case going to trial proceeds to the jury sessions. It is a rare case where the defendant waives a jury and proceeds to trial in a non-jury session, and that occurs generally only where the Commonwealth’s case is not strong. In the Superior Court, there is little need for the waiver or claim of jury trial to occur until the time of trial other than to permit the court to estimate how many jurors will be needed for a particular day. In both the district court jury sessions and the Superior Court, jury waivers are handled on the trial day.

D. Proposed Rule 11(b)(1)

The Committee elected not to recommend extending to the Superior Court the defendant-capped plea procedure available in District and Municipal Court by statute. However, proposed Rule 11 (b)(1) makes reference to the a “requested disposition”

being available. This is the language used to describe the defendant-capped plea, particularly in Rule 12 (c)(2)(b), and its use generally in Rule 11 could be read to make it apply in Superior Court. At the very least it should be qualified here to apply only to District/Municipal Courts.

Rule 12

A. Additional Warnings.

Where the legislature has made provision for required notice to a defendant tendering a plea of particular consequences of such plea and have made it a requirement for a valid plea, it is appropriate for the Criminal Rules to mirror the statutory provision. In several circumstances in proposed Rule 12, however, the recommended changes exceed or differ from what is statutorily or constitutionally required, and thus exceed or would change current requirements of the law. It is inappropriate to expand, through the rulemaking process, what is required for a valid plea or admission, and particularly inappropriate to do so would invade the legislative arena. To include in Rule 12 a requirement of notices that are not mandated by law as essential to a plea or admission in all circumstances, and notice of some of the collateral consequences of a plea could lead to the invalidation of pleas and admissions, even long after they are made, that are otherwise lawful. Since the proposal would require mentioning some, but certainly not all, collateral consequences, it could also operate to mislead a defendant.

12(c)(3)(A)

The Committee agrees that there is no state or federal constitutional requirement that a pleading defendant be informed of the presumption of innocence and of the burden and quantum of proof required to find guilt at trial, yet recommends that these additional warnings be included. The law has not changed on this point since *Boykin* was decided in 1969. This subdivision of the Rule describes the constitutionally-required notification of rights; Rule 12 should not be amended to add notice of any right not constitutionally required to be included in a guilty plea colloquy.

12(c)(3)(B) – Collateral Consequences

In this subsection the Committee proposes to add notifications of a several collateral consequences of a conviction as part of a valid guilty plea or admission. As stated above, it is not good policy to include as part of the colloquy anything that is not required by law as necessary to a valid plea or admission. See *Commonwealth v. Morrow*, 363 Mass. 681 (1973); *Commonwealth v. Hason*, 27 Mass. App. Ct. 840 (1989)

Community Parole Supervision for Life. There should be no required notice of the possibility of having community parole supervision for life imposed under G. L. c. 265, § 45 and c. 275, § 18. Under the statutory provisions this supervision is in addition to any sentence or probationary term that is part of the sentence. If the prosecutor intends to seek community parole supervision for life, by statute the motion must be filed after conviction but before sentence is imposed. The same timing applies for the offender's motion that it not be imposed. Nor is imposition of this supervision by any

means automatic. There are three separate categories for this type of supervision and they can arise under a variety of different circumstances. Even in some cases where it is mandatory,[7] it may only be imposed upon sufficient proof, and may not be imposed at all if the prosecutor so moves or if the defendant succeeds on a motion that it not be imposed. There is no requirement under the law or the Rules that a defendant be told of the parole consequences of a conviction. Supervision under these statutes, while imposed by the judge, is a parole consequence of certain convictions. It is not part of the proof of the crime and is not the sentence. To require notice of this possible parole consequence would set an unwarranted precedent concerning notice of parole consequences of all sentences, including life sentences that have lifetime parole. By indicating that the appropriate motions should be brought after conviction, the legislature may have implied its intent that discussion of this possible consequence should not be part of a valid plea colloquy. It did not, as it did with other collateral consequences, specify in the statute that it should be part of the plea. The Rule should not require this notice.

Sex Offender Registration. Nor should the Rule be amended to require notice of the possibility of registering as a sex offender. G.L. c. 6, § 178E(d), provides that prior to accepting a plea the court must obtain the defendant's acknowledgment in writing

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[7]It appears that under G.L. c. 265, § 45, repeat sex offenders of specified statutes are mandatorily subject to community parole supervision for life, without motions, hearings or a judicial finding. The legislature has described this mandatory category of supervision to be "punishment." Even so, the legislature did not indicate this notice be required of a valid plea. If it is deemed to be punishment, notice of its application would be given when the defendant is told of the maximum sentence possible. There is no good reason to include this or the other possible circumstances of community parole supervision for life in Rule 12.

that the plea may result in registration. Importantly, however, the statute specifically provides that failure to so inform a defendant is not grounds to vacate or invalidate the plea. While a statutory provision that pleas should not be invalidated where the notice is omitted would prevail over a contrary implication in the Rule, it is far preferable not to create confusion and to allow the statutory provision for this notification to stand on its own.

Sexually Dangerous Person Commitment. The Committee chose not to adopt the proposal to delete the provision in the current Rule 12 concerning notification of the possibility of sexually dangerous person commitment proceedings. There are a number of reasons why it is no longer appropriate for this notification to be part of a plea colloquy. When the Rule was enacted and for many years thereafter, commitment as an SDP was the disposition of a criminal case and was imposed by the judge in lieu of sentence. At various times until 1991, under G.L. c. 123A, § 5, SDP commitment was imposed in lieu of sentence or was required to be imposed at the time sentence was imposed.

In contrast, under the current statutory scheme, SDP commitment has nothing to so with the sentence or the imposition of sentence. SDP commitment proceedings are now brought only after the sentence has been fully served, and it is impossible to predict at the time of a plea whether commitment will be sought years later. These proceedings now have no relationship to the plea. While the current crime is a necessary predicate to civil commitment, whether proceedings will be brought depends on a myriad of other factors including the individual's prior history as well as his or her behavior and treatment during incarceration.

There is an additional reason to delete from this subsection the reference to the sexually dangerous person proceedings of the General Laws. The current language refers to "different or additional punishment" based on the SDP laws. However, this Court has consistently held that commitment as a sexually dangerous person under both the prior and the current versions of G.L. c. 123A, is not "punishment." See, e.g., *Commonwealth v. Bruno*, Mass. (2000). Commitment now looks to the status of the person as sexually dangerous not at the time of plea and sentencing as before, but at the time of prospective release from custody. The provision for notification of this remote consequence should not be required by Rule 12 and should be deleted.

Consecutive Sentences. The Court should seriously entertain whether to retain the provisions of this subsection that require a judge to notify a defendant of the possibility of consecutive sentences, The statutory provision that sentences may be concurrent or consecutive gives adequate notice of the possibility they may be consecutive. Even so, the prosecution's recommendation, of which the defendant is aware, will signal whether consecutive sentences are a likely possibility. If the judge would exceed the prosecutor's recommendation, or in the District Court exceed the defendant's proposed disposition, the pleas or admission may be withdrawn.

Minimum Sentences. Notification about "minimum" sentences poses a different problem. Given that there are a number of ways the legislature has provided for "minimum" or "mandatory minimum" sentences, see *Commonwealth v. Brown*, 431 Mass. 772 (2000), this provision would add an unnecessary component to plea colloquies. Again, the ability to withdraw a plea provides a defendant with both notice

and protection from surprise.

Second or subsequent offense. As to the provision in the current Rule concerning notice where the maximum sentence is increased if the case is charged as a second of subsequent offense, the defendant will already be given notice of the maximum possible sentence, and this provision should be deleted as duplicative. The difficulty in the current language in Rule 12 (c)(3)(B) is its use of the phrase "different or additional punishment based upon a [second or subsequent] offense." It is less than clear whether this could be read to require specific notice of such statutory conditions as parole limitations, or conditions of confinement that include restrictions on work release, furlough and the like. Notification of such conditions on those serving sentences as well as those which might entail loss of license or pension or debarment from certain employment, should not be necessary to a valid plea colloquy, despite the fact that they are not deemed "punishment." All that should be required is notice of the statutory maximum sentence possible.

12(c)(3)(C) – G.L. c, 278, §29D Notifications

In this provision the Committee proposes to mandate notification of the immigration consequences of a guilty plea or admission outlined in G.L. c. 278, §29D. While it is clear that this notification must be given, by the terms of the statute itself it is only where the defendant can show that he or she may be subject to these consequences that a guilty plea can be invalidated if the notifications are not provided. To include these notifications in Rule 12 would permit invalidation of a plea if the notice was omitted even if the defendant would not be subjected to the adverse consequences and thus would change current law on this matter. Furthermore, the statute only applies

to pleas and not to admissions to sufficient facts. *Commonwealth v. Villalobos*, 437 mass, 797 (2002). It is for the legislature to change the statute to provide for its application to admissions to sufficient facts, *id*., not this Court through the rulemaking function. Judges can still be encouraged to engage in the "better practice" (*Commonwealth v. Hilaire*, 437 Mass. 809 (2002)), of giving the notification in the case of an admission to sufficient facts, without changing the legislation by rule. This provision should not be included.

B. Defendant's Request for Disposition in District Court

The Committee intended to insert into Rule 12 (c)(2)(B), the statutory provisions of G. L. c. 278, § 18, but as drafted is not the same as the statute. If this is included in the Rule to reflect the statutory provision, then it should mirror the statutory language. For example, while the statute permits the court to dispose of the case on any dispositional term within the court's jurisdiction, it qualifies this to apply only to cases within the District Court's "final jurisdiction," and adds the important phrase, "unless otherwise prohibited by law." The proposed Rule, on the other hand would seem to apply to any case while it is in the District Court, and only the disposition would have to be in the District Court's jurisdiction. The difference is not just semantic or the variation in language unimportant given that it is within the District Court's jurisdiction to place cases on pretrial probation with an expectation of dismissal. Any difference in language between the statute and the rule could likely cause confusion, and under the rule of lenity could be construed to defeat legislative intent and restrictions.

In addition, the proposed provision about the defendant-capped plea would seem to also include pleas of nolo contendere, where the statute not does make those pleas eligible for the procedure. G.L. c. 278, § 18, limits the procedure to guilty pleas and admissions to sufficient facts. The rule should not exceed the scope of the legislation especially where it involves a procedure designed to severely limit the prosecutor's involvement and where it does not require an admission of guilt.

Rule 13

A. *Time to File Pretrial Motions*

The report acknowledges that the provision in G.L. c. 278, § 18, that pretrial motions in the District Court shall be filed within 21 days of claiming or waiving jury trial is workable for the District Courts,(see District/Municipal Criminal Rule 6) but not necessarily appropriate the Superior Court practice. Rather than following the statute to describe the procedures applicable to the District Courts, and formulating a workable procedure for the Superior Courts, the Committee has created a procedure to apply to all courts and which is contrary to what the statute provides for District Court. It is well within this Court's authority to develop a fair and workable rule, but not one that is contrary to statute. This is also another example of the point made previously that procedures and practices should not be made applicable to both the Superior and the District Courts where they are not practicable or workable, merely for the sake of consistency.

The proposal would have pretrial motions filed before the assignment of a trial

date or 21 days thereafter. Under proposed Rule 11, if discovery is complete by the pretrial hearing the court may elect to schedule the case for trial without the separate assignment of trial date. Presumably the trial could not be set in less than 21 days, but the proposed rules does not seem to take into account nondiscovery motions and could still result in these motions being heard at the time of trial. Once again the procedures in Rule 13 for the Commonwealth filing discovery motions is made unnecessarily complex and cumbersome because of the view that due process forbids the Commonwealth from obtaining any discovery until it has completed full discovery to the defense. The process for filing discovery motions should be simplified. Contrary to the expectation of the Committee that discovery motions would be rare under proposed Rule 14, I believe that they will be fairly common and routine, especially in Superior Court.

B. *Right to a Hearing on Pretrial Motions*

Rather than providing a "right to a hearing" on pretrial motions, the rule should specify a "right to be heard", but not necessarily a right to a hearing. Where a motion is not in the proper form, for example lacking an affidavit by one with personal knowledge, the judge should be able to rule without having to conduct a full hearing. The proposal appears to agree with this notion, but the language could lead one to conclude otherwise.

Thank you for the opportunity to comment on these important matters.

Respectfully submitted,

Pamela L. Hunt, Esq.

April, 2003

Minority Report in Opposition to Proposed Rule 14

(2001)

As the representative of the Commonwealth's eleven District Attorneys and the only Assistant District Attorney on the Committee, I want to state my opposition to the proposed changes to Mass. R. Crim. P. 14. This opposition reflects the unanimous position of the Commonwealth's District Attorneys. The only other prosecutor on the Committee is Assistant Attorney General Pam Hunt. It is my understanding that the Attorney General joins the District Attorneys in their opposition to the proposed changes to Rule 14. Assistant Attorney General Hunt will confirm this in a separate memorandum.

Since the adoption of the Criminal Rules of Procedure in 1979, both prosecutors and defense lawyers have operated under the requirements of Rule 14. Over the years, the respective obligations of the parties have been further defined by opinions of the Appellate Courts of the Commonwealth. Today the overwhelming majority of cases are tried or otherwise disposed of without any discovery dispute.

Proposed Rule 14 will bring massive changes to the rules requiring a decade of litigation before the parties are certain of their respective obligations. The proposed rule will not result in a reduction in the number of discovery motions filed. Currently most of these motions are pro forma and generally agreed to by the parties. Many defense lawyers file motions for items the Commonwealth has already agreed to provide in a pre-trial conference report solely to protect themselves from allegations of ineffective assistance of counsel. These concerns will not disappear with the new rule, and therefore these motions will continue to be filed. Since the new rules will require extensive litigation before the parties are fully aware of their respective obligations it is expected that motion practice will increase as a result of the changes.

The proposed rule creates extraordinary burdens on only one of the litigants in criminal cases, prosecutors. It would affirmatively require an unending search of both government and private files. The rule does not open merely the prosecutor's file but also the file of every government agency of the Commonwealth and the Commonwealth's subdivisions. It also opens private files of those citizens and businesses are victims of or witnesses to crime. Currently, when information is requested by motion or the subject of an agreement set forth in a pretrial conference report, the motion or pretrial report provides the specificity required to find the desired information.

The proposed rule will unduly burden prosecutors by requiring busy work that has no realistic chance of affecting the outcome of the case. Requiring the Commonwealth to submit the names and dates of birth of police officers for record checks or providing the identification procedure in a domestic violence case will not enhance the defense. It will merely burden prosecutors.

My specific objections to these rules are as follows:

Section A(1)(A) Mandatory Discovery for Defendant: This section requires that virtually all discovery be delivered to the defendant at the pre-trial conference. While this may pose little trouble in the District Court on a motor vehicle offense, it would pose an undue burden on prosecutors in murder cases in the Superior Court. Current practice allows the lawyers to agree on dates. In cases where they cannot agree, the judge is asked to establish the date. Section B leaves it to the parties to establish a date for reciprocal discovery. This is in accord with current practice, and I do not object to it. The same procedure should apply to prosecutors.

This section further expands the prosecutor's discovery obligation to items beyond the prosecutor's possession, custody or control. It is unfair to require prosecutors to become responsible for providing items beyond their possession, custody and control, especially where prosecutors are required to file certificates of compliance under Section (3). Moreover, private business and individuals who are the victims of criminal wrong doing should not lose Fourth Amendment protection and privacy rights because they have been victimized, witnessed a crime or otherwise cooperate with law enforcement.

The proposed rule is overly broad. It includes material in the hands of third parties. While recognizing that Commonwealth v. Beal's construction excludes complainants and independent witnesses who are not agents of the prosecution with regard to some aspects of the case, the reporting notes do not help in clarifying the rule. The rule's original language was clear and should remain, that is, all material "within the possession, custody or control of the prosecutor." Mass. R. Crim. Pro. 14(a)(1)(A) and (C).

Section (a)(1)(A)(ii): The rule should be restricted to the minutes of the grand jury testimony that formed the basis of the indictments in the case on trial. Otherwise prosecutors are responsible for mandatory discovery of grand jury testimony they do not know exists, including federal grand jury testimony and testimony in another county. Statements of persons are already covered by (a)(1)(A)(vii).

Section (a)(1)(A)(iv): The overwhelming majority of witnesses called by the prosecution are police officers. Employment as a police officer is barred to felons. G.L. c.41, §96A. Requiring prosecutors to provide a list of witnesses to probation with the names and dates of birth of police officers will unduly burden prosecutors without providing any meaningful benefit to the defense. In addition, this requirement creates a risk of sanctions for lack of compliance for failures of the probation department (which is not under prosecution control).

Section (a)(1)(A)(v): Determining what experts the prosecution may use by the pretrial conference report date is unworkable. Also, the requirement that all publications authored by an expert be provided is too burdensome and unnecessary. Most significant

writings are specified in an expert's curriculum vitae. If the parties desire more information they can contact the expert directly.

Section (a)(1)(A)(vi): The section is overbroad and unduly burdensome. When read in conjunction with Section (a)(1)(A) it fails to provide guidance on what must be provided. Does the prosecutor become responsible for disclosing every piece of paper in the police station that relates to the defendant, any co-defendant, or any witness? Does that obligation extend to other cases or arrests? Does that extend to documents at the jail? Does it extend to documents at other police departments concerning other cases? Does this apply to the private files of third parties?

The section requires the prosecutor to provide statements of persons while requiring defendants only to provide statements of witnesses the defendant intends to call at trial. The rule further requires prosecutors to identify those items the prosecutor will introduce as exhibits by the pretrial conference date. Early disclosure is unworkable and in any event the identification of which specific items will be offered later at trial as exhibits (as distinguished from requiring the production of all relevant documents and things) in effect discloses an attorney's thought processes which should be protected as work product.

There are also concerns that making production of the report of physical examinations of any person mandatory will unduly invade the privacy of people who are merely witnesses to an action by requiring their mandatory discovery without the prior approval of the court.

Section (a)(1)(A) (vii): The vast majority of cases are not "ID" cases. The parties knew each other or the crime was witnessed by police. It is merely busy work to require prosecutors to provide a summary of identification procedures, for example, in a domestic violence case. In those few cases where there is an identification procedure, police reports generally provide sufficient information to the defense such that counsel do not currently request additional information. The rule should not require prosecutors to do in every case that which is only required is a very small number of cases. Motions can be filed in those rare cases.

In effect, the proposed rule requires the Commonwealth before every pretrial conference, to interview every witness who identified the defendant and the officers present for the identification, to ensure any and all statements made by either party are reduced to writing, for anything they say during the identification process is going to fall under the "fairness or accuracy" portion of this rule.

Section (a)(1)(A)(ix): This proposed section is especially troublesome. A rule that requires prosecutors to reveal the identity of an informant can cost the informant his/her life. It abolishes the longstanding rule protecting the identity of informants except in rare cases where the informant's identity is revealed under the supervision of the court.

The section speaks about "government informant." If adopted, this would require the prosecutor to contact every federal, state, and local police agency to determine whether any prospective witness is an informant. Assuming the agencies complied, the Commonwealth would be required to file a motion for a protective order. Even if the name were not disclosed, the fact that one of the witnesses is an informant will, in effect, identify a person as an informant in many cases.

The introduction of wiretap evidence is currently governed by statute. G.L. c.272 §99O. Service of the warrant on those whose conversations are intercepted is governed by G.L. c.272 §99L. Revealing the existence of the interception without complying with the statute or by court order is punishable as contempt of court. G.L. c.272 §99N2. Officers and agents are permitted to intercept, but not record, conversation for purposes of safety. However, these conversations are not admissible in court. G.L. c.272 §99D1e. It is unnecessary and of little or no probative value to list each officer who happens to be listening to the wiretap. The tapes speak for themselves.

Section (B) Reciprocal Discovery to Prosecution: This section limits the defendant's discovery obligations to information "the defendant intends to use at trial." This conflicts with the Supreme Judicial Court's pronouncement in Commonwealth v. Reynolds, 429Mass. 388, 397-398 (1999), that a defendant's discovery agreement to turn over statements of any witness is not limited to statements of witnesses a defendant intends to call at trial, but includes as well statements tending to impeach a prosecution witness. It is noted that while the prosecutor has an affirmative duty to "disclose to the defense" all discoverable information under (a)(1)(A), the defendant need only "permit the Commonwealth to discover" under this section.

It is noted that the parties are permitted to establish a date for the defense lawyer to comply with its discovery requirements while the prosecution is required to comply by the pretrial conference date. Both parties should be able to meet and establish the dates for compliance appropriate in the circumstances of each case.

Section (C): Stay of Automatic Discovery: By agreement, the parties should be able to stay the discovery process without going back to court. Given the unrealistic time frames for discovery established by the proposed rule, a stay may be sought in numerous cases, adding to the enormous amount of paperwork already generated in criminal cases. Prior to this rule, the parties themselves could, and did, coordinate timetables which were realistic.

Section (a)(1)(D) Record of Convictions: There is no reason why the probation department, without a request from either party, should run countless records of the witnesses in each case.

This is especially true since the overwhelming majority of witnesses will be police officers creating busy work for the court, probation and prosecutors. Many other witnesses provide information that is not really disputed and neither party is interested in their criminal records.

Section (a)(1)(E) Notice and preservation of evidence: Evidence at crime scenes is gathered by many sources. Evidence gathered by the police is kept at the police station unless it is being examined or tested. Such evidence is generally made available to the defense by appointment at the police station. Some evidence is gathered by forensic experts and taken directly to the lab. Such evidence is later assigned to a chemist for testing. The prosecution often does not know of the existence of forensic evidence until a report is issued. Other evidence, such as booking tapes, tapes of activities in the jail, or tapes of phone calls at the jail, is not specifically known to the prosecution. On occasion the defense will request these items by motion, and they are obtained for them. Are the booking photos and fingerprints an item of evidence? In 99% of cases, they never are. Prosecutors will be required to determine from third parties whether they have any information that might fall within the scope of the proposed rule. The proposed rule becomes an omnibus request for production of documents without the parameters being set by the requesting party. It requires a prosecutor to go on an endless search for items that in the overwhelming majority of cases neither side has any interest in seeing. Once these items are "found" the prosecutor is required to list them and to provide the list to the defense. The rule should not codify procedures that may be helpful in a tiny minority of cases and apply it to all cases. That would be unduly broad and burdensome to prosecutors.

Section (a)(2) Motions for Discovery: The proposed section would in reality establish two dates for discovery motions, one for the defendant and a second for the prosecution after a certificate of compliance by the Commonwealth is filed.

Section (a)(3) Certificate of Compliance: This section serves no real purpose. If a party is not satisfied with discovery, then he/she should file a motion to compel. Furthermore, the Commonwealth's continuing duty to disclose exculpatory information and related discovery means that multiple certificates may become necessary in a single case.

Section (a)(6) Protective Order: This rule requires the prosecutor to file either a motion not to disclose or motion to protect records before a request for such records is even made by the defense. The proposed rule places the entire burden of discovery on the Commonwealth. Despite the protective order rule, privileged records should be exempt and handled specifically by motion.

Section (a)(8) Waiver: A written waiver should not be a requirement. It is particularly inappropriate in District Court proceedings.

Section (b)(1) Notice of Alibi: Section (b)(1)(B) does not provide a deadline for the defense response to the Commonwealth's request for notice of alibi. Nevertheless, it requires the Commonwealth to investigate the alibi, determine the names and addresses of witnesses who will contradict that alibi and place the defendant at the scene of the crime, and provide this list to the defendant within seven days.

Section (b)(1)(f) Inadmissibility of Withdrawn Alibi: This contradicts the holding in Commonwealth v. Rivera, 425 Mass. 633 (1997), permitting a prosecutor to use a defendant's pre-trial affidavit to impeach the defendant's testimony on the witness stand.

Section (b)(2)(A) Lack of Criminal Responsibility: This section only requires notice that the defendant "intends to rely upon a defense of lack of criminal responsibility." If a new rule is adopted it should state clearly that notice must be provided when the defendant's mental condition at the time of the crime is at issue. See Commonwealth v. Diaz, 431 Mass. 822 (2000). The defendant should be required to file a notice if he intends to rely upon a defense of lack of criminal responsibility because of a mental disease or defect or a defense that the defendant could not form the required intent because of a mental disease or defect or the ingestion of alcohol or drugs.

Section (d)(1) Definition of Statement: This section should continue to require that the writing be adopted or otherwise approved by the declarant. A writing made by a third party should not be considered the statement of a person who has not adopted or in some way approved of it. Indeed, the person may never have seen it.

Comments on Reporter's Notes:

The concerns addressed above are further demonstrated by the interpretation of the rules that appear in the Directions Regarding Reporter's Notes. The Reporter's Notes appear to interpret or redefine the current case law. The reporter's notes should not be used to adjudicate questions of substantive law. That is the proper function of the court. Both prosecutors and defense counsel are aware of their respective Brady obligations.

Section (a)(1)(A)(iii): There is no requirement of which I am aware that calls for the Commonwealth to divulge information that "casts doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief." Obviously, the Commonwealth is aware of its ongoing obligation to supply exculpatory information. This language is overly broad and unnecessary.

Section (a)(1)(A)(viii): Again, the standard requiring production of exculpatory information which we have used for years is sufficient. While the case law has admitted evidence of a hearsay declarant's bias, here the language greatly expands the Commonwealth's obligation to any bias-like information without reference to limitations

such as a time frame. The reading of the rule becomes overly broad and cumbersome.

Section (a)(1)(E): It is unnecessary to include a general statement that nothing found in the rules is inten prohibit the court from ex parte considerations. Ex parte motions are impermissible. Mass.R.Crim.Pro. 13(a); Pa 420 Mass. 216, 218 (1995). It would be fundamentally unfair for a judge to order discovery without hearing fro

Conclusion

By imposing substantial new discovery burdens only on prosecutors, the new rule tilts the playing field ag Commonwealth. Prosecutors are placed in the difficult position of having to file a certificate of compliance conc not in their possession, custody or control. It will require a substantial amount of time to amass information whi defense. The current rule protects a defendant without making the trial of criminal cases a procedural minefield the thrust is no longer the guilt or innocence of the defendant, but whether a prosecutor has been able to collect a The proposed rule will "…do violence to the weighty public interest in ensuring that wrongdoers are convicted o commit…The Commonwealth as well as the defendant, has the right to a fair trial." Commonwealth v. Lowder, 102 (2000).

Respectfully submitted,

Carmen W. Picknally, Jr.
Assistant District Attorney
Hampden County
Member of the SJC Committee on the Criminal Rules

Update to 2001 Minority Report in Opposition to Proposed Rule 14

On Monday, March 31, 2003, I received the Final Submission and Report to the Supreme Judicial Court by the S.J.C. Standing Advisory Committee on the Criminal Rules. The matter is scheduled to be heard on Friday, April 4, 2003. Assuming the committee will want to vote on the rule that day, I have prepared this update to the 2001 Minority Report in Opposition to Proposed Rule 14, which is attached. Because of time constraints, I will not address each item individually as was done in the 2001 Minority Report. Instead I will address our general concerns about the proposed changes to Rule 14.

The District Attorneys of the Commonwealth remain opposed to the Proposed Rule. This is not a reflection of animosity toward members of the committee. They have at all times been courteous and attentive to our concerns. It is the professional opinion of the Commonwealth's prosecutors who must labor under the proposed Rule 14 that the proposed rule should not be adopted. We are concerned that the proposed Rule 14 is too vague and formless to give guidance as to what is required. It will also require prosecutors to expend countless hours collecting information unwanted or unneeded by the defense.

The proposed rule begins by expanding the current Rule 14 (a)(1)(A) obligation for items "within the possession, custody and control of the prosecutor or persons under his direction and control" to also include "persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case." This does accurately quote Commonwealth v. Daye, 411 Mass. 719, 734 (1992). However, Daye, in additional language, recognized that "…ordinarily the prosecutor's obligation to disclose information is limited to that in the possession of the prosecutor or police." Id. at 734. Under the current system, in those cases where the defendant desires something in addition to that usually kept in the police case file, they file a motion. This directs the prosecutor's attention beyond the police file. What is requested is then recovered. Otherwise the prosecutor is left to speculate as to what are his or her obligations.

Also, for example, proposed Rule 14 (a)(1)(A)(i) speaks about delivering the substance of any oral statements made by the defendant or a co-defendant. Clearly, with written, recorded or oral statements reduced to writing in a police report, the prosecutor knows what has to be delivered. Likewise, if an oral statement of the defendant or co-defendant is intended to be used at trial, a prosecutor would know what it is. But what is an "oral statement?" As proposed, a prosecutor would arguably have to discover and turn over everything a defendant and a co-defendant said to the police or any witness. How does a prosecutor accomplish that task practically?

Similarly, proposed Rule 14(a)(1)(A)(vi) requires "…all other material and relevant evidence…documents…tangible objects…" be automatically given out in discovery. How can the prosecutor know what should be given out without a motion from the defendant to join the issue? Is the prosecutor now required in every case to provide the booking tape, all 911 calls, radio tapes, and fingerprint cards? Are the police now required to expend the money and personnel to duplicate these items in each of the tens of thousands of arrests each year?

Pursuant to proposed Rule 14 (a)(1)(A)(iv) the prosecutor must submit a witness list with dates of birth to probation to have the records checked. This obligation would include police officers and non-contested witnesses. Thus, tens of thousands of times each year, the prosecutor will automatically have to obtain such information, compile such a list and then submit it to probation when the only witnesses in the case are police officers, all on the off chance one might have been convicted of a misdemeanor within the last five years and though the defendant has not requested such information.

A comparable obligation to provide a summary of identification procedures and all statements made in the presence of or by an identifying witness relevant to the issue of identity would be imposed by Proposed Rule 14 (a)(1)(A)(vii). The reporters on page 78 of the committee's submission assert that this only has to be done in cases where there has been an identification procedure, but the defendant is identified by someone, in some way, in every case. What is an "identification procedure"? How can the prosecutor know if identification is an issue in advance of the issue being framed by a defendant's motion.

These examples show the vice of the proposed rule. Prosecutors are put in the position of not knowing exactly what they are required to produce. This is of particular concern as the proposed rule requires that a certificate of compliance be filed. Those who are not required to produce the discovery and sign the certificates of compliance may believe these fears are groundless. However, they are not the people whose compliance may be subject to possible BBO sanctions for a discovery mixup. Motion practice can be tedious in the first sessions of the Commonwealth, but it serves the valuable purpose of framing the issues, making the processing of cases more efficient.

The inefficiency of the new rule is highlighted by the fact that under proposed Rule 14 (a)(1)(E)(8) any extension of time for the delivery of discovery must be by written waiver served on all the parties. This replaces informal agreements between lawyers used thousands of times each year. Considering the number of cases in the courts, discovery disputes are rare. Since the adoption of the rules in 1979, the current requirements have been fleshed out by the courts, and the parties know their respective obligations. The new rule will lead to decades of litigation to return to the level of certainty we have today.

In all other respects I rely on the 2001 Minority Report in Opposition to Proposed Rule 14 which is attached.

Conclusion: It is the considered opinion of the District Attorneys of the Commonwealth that the proposed Rule 14 should not be adopted.

_____
Carmen Picknally
Assistant District Attorney – Hampden County
Representative of the District Attorneys on the
SJC Committee on the Criminal Rules

MINORITY REPORT

SJC STANDING ADVISORY COMMITTEE ON THE CRIMINAL RULES

To The Chief Justice and Associate Justices of the Supreme Judicial Court,
and Members of the Standing Advisory Committee:

It is with respect to the Chair, the Reporters and to each member of the Standing Advisory Committee that I must dissent from the recommendation of the Committee on the proposed changes to Rule 14 of the Criminal Rules. I appreciate that following the receipt of public comments, the Standing Advisory Committee made some modifications that addressed some real concerns that had been raised. Although the procedures of the Committee have given me an opportunity to file this Minority Report, I hope that the Members appreciate that I do not do so lightly. Nevertheless, as an attorney, a criminal law practitioner, and one who seeks to approach the Committee's task in the best and fairest manner, rather than simply one of the two "prosecutors" in the group, I find that the Committee's proposals, if enacted by the Court, would create such practical difficulties that I believe the Court should have the benefit of other views as it considers whether to make these very substantial changes to the law of the Commonwealth and to the Court's rules.

Mr. Picknally, who represents the Massachusetts District Attorneys Association, has submitted a separate Minority Report. He has outlined how the many of the proposed changes would affect the interests of the Commonwealth and of prosecutors in every criminal case, and makes some very telling points as to how these changes would work in practice. I concur in his views and ask the Court to seriously consider

whether enacting a Rule which engenders such strong opposition from a group of professionals representing the Commonwealth's interests, is in fact a wise and prudent course. It is particularly telling that for so many of the Advisory Committee's suggested changes to other Rules there was near unaniminity, yet for the Rule 14 proposals opinions were strongly held and the differences remained acute. The points I make are not solely my own; they have been developed after numerous conversations with others within the Attorney General's office, with other criminal law practitioners and with others who would be affected by the suggested changes.

A. *IS THERE A NEED FOR SUCH A SWEEPING CHANGE?*

Throughout the years that I have participated as a member of the Advisory Committee, the initial question we have always asked was whether there was a problem with current practice that needed addressing through a rules change. This was not the case with Rule 14. We have never been made aware of any serious or practical problems that have arisen in the area of discovery that call for amendment to the Rule at all, much less in the dramatic manner proposed. In the overwhelming majority of cases, under current Rule 14 discovery in both the Superior and the District and Municipal Courts proceeds routinely without controversy or enmity. And there is no general unsettling feeling that under this practice, the system is "unfair" to defendants. Nor is there any reason to believe that under the present system prosecutors are not abiding by their discovery obligations, or are doing so reluctantly. The legal issues surrounding discovery that have arisen in recent years generally have concerned information possessed by third parties, not discovery from the prosecutor. From all that

appears, the decision to fundamentally alter the nature of discovery practice may have come at least in part from dissatisfaction with some of this Court's decided cases. Of course the Court has the power and authority to enact criminal rules and to change current decisional law through rulemaking, at least to the extent the legislative will is not overridden. The basic question here is not whether the Court can make these changes but whether it should do so, especially where the adverse practical effects would be substantial and it would result in little if any benefit to the efficient operation of the system.

B. SPECIFIC OBJECTIONS

In addition to the specific points made by Mr. Picknally in his submission, I offer comment on the following specifics:

1. *This Will Not Make Criminal Discovery Practice More Efficient*

The proposal reflects a philosophy that views all discovery, regardless of the source, as mandatory. The rule would require, without a discovery order, automatic discovery of everything that is now viewed as either mandatory or discretionary after hearing and upon a judicial order. It anticipates that discovery is mandatory and automatic and that the judge would only become involved with discovery issues if there was some special circumstance calling for a protective order, or to impose sanctions for noncompliance. If this change is intended to force the parties to agree to provide each other as much as they can without court involvement, the changes are unnecessary as they already do so under the present rule. If it is intended to streamline the process by eliminating "discovery motion" court hearings, I suggest that this will not occur. Current practice already expects the parties will make every effort to agree on what discovery

will be provided and the time frame in which to comply, and that is routinely done. However, It is unrealistic to assume the trial court's involvement in discovery issues would decrease under the proposed formulation of discovery practice. Under the proposal, because the prosecutor would have little guidance on what might ultimately be deemed "relevant," and because the Rule creates an obligation to seek out vast but undefined information from third parties, it is unrealistic to think that a conscientious prosecutor will not frequently apply to the Court for orders limiting or delaying discovery, to be relieved from providing what he or she cannot provide, for protective orders, or to clarify discovery obligations. As the attorney will have to sign and file a certificate of compliance of discovery in every case, and because the sanctions for being "wrong" in that certificate are significant both to the case and potentially to the attorney personally, it does not take much to conclude that counsel will resort to the court for orders on discovery. In the end, rather than reducing court time on discovery matters, it may in fact increase it.

2. *District Court Practice Differs from Superior Court Practice*

I agree in principle that wherever and whenever practicable, procedures should be similar in the District and Municipal Courts as in the Superior Court. But the reality of criminal practice is that the typical District Court case is simply different in complexity from the typical Superior Court case. Rules and practices appropriate for the District and Municipal Courts and which reflect the need to deal both fairly and expeditiously with an extremely high volume of cases are not workable for most cases in the Superior Court. Many of the proposed changes are simply not practicable for the typical Superior Court case, and will result in more, not less, litigation of discovery matters. The

Committee has recognized the differences in the two systems in at least one area. It declined to recommend expanding to the Superior Court the defendant-capped plea that is currently legislatively authorized for the District and Municipal Courts. Similar distinctions are appropriate for discovery practice. Some of the procedures, if applied in the District and Municipal Courts create extra and unnecessary steps in what is now routine and working well, and would burden the parties unnecessarily. Preparing precise lists of what has been provided when the whole file has been made available is unnecessary. So is requiring the Probation Department to produce criminal records of every prospective witness. Other procedures called for by the rule are unrealistic for Superior Court practice. For example, the Rule would require the prosecutor to comply with all automatic discovery by the pretrial conference date (except reports by experts). Effectively requiring the prosecutor to have the whole case fully planned, and knowing what expert witnesses will be used by the time of the pretrial conference report is unworkable. Nor is there any reason to deny to the prosecutor reciprocal discovery until after all discovery from the Commonwealth is complete and the prosecutor affirms so in the certificate of compliance. Requiring the government to produce a list of the expert's[1] publications is burdensome. The rule would also require production of current resumes, etc. for each intended expert, including narcotics officers with opinions in drug cases, police officers offering opinions in OUI cases, and even EMT, nurses and other medical personnel offering testimony on simple and routine matters.

[1] While included in the "Automatic Discovery" portion of the proposed rule, section (a)(1)(A)(v) refers to the court ordering discovery of all expert opinion evidence. This is confusing at best.

3. Victim and Witness Addresses

With automatic discovery to be provided by the pretrial conference, the prosecutor would have to interview, inform witnesses and assess their need or desire to seek to invoke their rights under G.L. c. 258B, for protection against disclosure of their addresses. This would of course require a motion in every applicable case.

4. "Relevant to the Case" is a Vague Standard

A structure where discovery is mandatory from the prosecution, and which requires disclosure of material "relevant to the case" (Rule 14 (a)(1)(A)), is fundamentally flawed. It provides no real guidance. After receiving public comments, the Committee abandoned its initial choice to require discovery of material "pertinent" to the case, but the change to "relevant" does not significantly help the parties to understand their obligations. It is impossible to determine all the information the defense would find helpful or relevant without the defense first giving the court and the prosecutor some indication. This "notice" of the scope of the range of desired information is best given by means of a defense request or motion for discovery. In the routine case, once the prosecutor knows what the defense is seeking he or she can determine whether the prosecution has custody and control of the information, can assess any concerns that would attend disclosure, and most often will agree to provide it in response to the motion. Where a discovery request reaches further, or where it is less obvious what is sought, there is less reason to believe the prosecutor could anticipate what the defense would want. While it may be an oversight, I also note that "pertaining to the case" is retained in Rule 14 (1)(E)(ii).

5. "Possession, Custody and Control"

Despite efforts to indicate the prosecutor's discovery obligations would only apply to that which is within his or her "possession, custody and control" as that phrase is currently used in Rule 14 and has been defined in case law, by adding additional circumstances to that definition, it creates a sense that the proposed Rule in fact intends to expand the obligation beyond current case law. There is no reason to change the phrase beyond the words now appearing in Rule 14.

6. *Notice and Preservation of Evidence*

Proposed Rule 14 (a)(1)(E) creates obligations for information not within the possession, custody and control of the prosecution. The prosecution must with specificity notify the defense of the existence and, if known, the location of any such information that would be automatic discovery if the prosecution had it. This creates a difficult burden to "dig" out information from agencies that "regularly report to the prosecutor's office" especially as it is difficult to determine what the defense would see as "relevant". Again, it underscores the value of having the defense indicate, by motion, the kinds of things it is interested in obtaining. Importantly, this provision also puts the prosecutor in a difficult position with victims and witnesses.

7. Definition of Witness Statement

The proposed rule radically changes the definition of witness statement. Currently, a witness statement is a writing by a person having percipient knowledge of relevant facts and which contains such facts and that are signed or otherwise adopted by the witness. The proposal would eliminate the "signed or adopted" part of the

definition and recast notes made by a police officer or other person of a witness's oral statements into a "statement" of that witness. It would exclude preliminary notes by an officer but only if those notes were incorporated into a later report. The current definition of witness statement provides a clear and unambiguous standard. The proposal would alter the decision of the Court in *Commonwealth* v. *Borans,* 379 Mass. 117, 151-152 (1979). It also impacts the protections of the work product doctrine. In *Borans*, notes made by an assistant district attorney and an investigator based on interviews with witnesses, and which were not signed or adopted by the witnesses, were not witness stats for Rule 14 purposes, and fell within the protections of the work product doctrine. Of course any exculpatory information, whether in a note or not, will be provided to the defense. The Court currently has a case under advisement (*Commonwealth* v. *Liang*) addressing these principles as they apply to another member of the prosecution team, the victim witness advocate. The arguments to the Court by the Commonwealth and the Attorney General and the Victim and Witness Assistance Board more fully describe the implications of altering the law as this proposal would do. As a policy matter, such a change may in fact discourage police officers from taking notes at all, a result that surely would not further the seeking of truth. At trial a witness should not be able to be impeached by a witness statement that he or she never wrote or adopted, yet the spectre of this is raised by defining such "notes" as witness statements.

8. Reporters' Notes

While the Court does not enact Reporters' Notes, the Court has frequently

referred to them in its decisions interpreting the Rules. Because of this it is important to note that there are several intended additions to the Reporters' Notes that raise particular concern. The most significant is the Reporters' definition of exculpatory evidence, in referencing Rule 14 (a)(1)(A)(iii), to include information that "tends to cast doubt on...elements relating to the mens rea required or the degree of the crime; cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief; or cast doubt on the credibility or accuracy of any evidence the government anticipates offering in its case-in-chief." Not only is it dangerous and imprudent to offer a proposed definition of exculpatory evidence in the Notes, as it is a special term of legal art, definable by continuously evolving caselaw, there is simply no case law that puts within the government's exculpatory evidence obligation any requirement to disclose these things. The Notes also would give an interpretation of the scope of *Commonwealth* v. *Reynolds*, 429 Mass. 388 (1999), that is subject to some debate.

9. Interceptions and Informants

Rule 14 (1)(A)(ix). Since the Committee referred to the Court without endorsement a proposal to include as mandatory discovery information concerning interceptions of the defendant and "whether any percipient witness is a government informant whose identity and/or location is claimed to be privileged", I assume the Court will not seriously consider promulgating this suggestion. If that is not the case, I would point out that the language is vague and overbroad, reaching any interception of the defendant at any time, whether it "relates" to the pending case or not. For example,

under the proposed language a defendant with a pending motor vehicle charge who might have been intercepted in connection with an ongoing large scale narcotics investigation would be entitled to know in the motor vehicle case that he had been intercepted. This would clearly compromise the pending investigation. Nor would the harm be abated by protective orders, as the mere application for such an order could well "blow" the wiretap. The strict nondisclosure requirements surrounding wire interceptions also mean that a prosecutor handling the nonrelated case would never even know about the interception, even if it were supervised by another prosecutor in his own office. Furthermore, the wiretap statute already requires eventual notification to those who have been intercepted, but since wiretap orders routinely contain language ordering postponement of this notice, a discovery obligation would put the prosecutor in violation of the Wiretap Order, and possibly personally exposed to liability. These provisions of the proposed rule, based on the continuing notion throughout Rule 14, that a prosecutor must make inquiry of all police and other agencies to seek out discovery, would be even more burdensome in this area. Whether wire or oral communications are "relevant or material to the case" is as unsatisfactory a standard in this circumstance as it is for other forms of discovery.

The third aspect to this part of the proposed Rule not only creates real concerns for the safety of individuals, is worded in a way that would impose unnecessary risks on them, and effectively undermine the government's privilege. If a person acting at the direction of the police is a percipient witness to the crime for which the defendant is charged, the law is clear that identity must be disclosed. As drafted, however, the suggested rule would require disclosing to a defendant that a person who is in some

matters is an informant and who just happens to be a witness to a crime, even if he is not acting at the direction of the authorities, is a "government informant."

10. Notice of Intent to Rely on Diminished Capacity Defense

The Committee has elected not to consider at this time revision to the separate parts of Rule 14 that deal with notice of alibi or lack of criminal responsibility defenses. Should the Court ask the Committee to review these provisions, it should also include a request to consider amending the Rule to require notice of intent to rely on a diminished capacity defense or a claim of inability to form a specific intent.

C. CONCLUSION

I understand that the Proposed Rule reflects a policy choice by a majority of the members of the Standing Advisory Committee, and that most of the points in both Minority Reports have been discussed by the Committee. The decision to oppose these specific changes should not be viewed as opposing even-handed, comprehensive and fair discovery practice. These are desirable and appropriate goals and the system should expect no less. However, under the current Rule 14 discovery is free and open, and does not unduly delay proceedings, burden the courts or deny defendants essential information necessary to determine whether to seek a disposition short of trial. Those matters that are not "usual" or which require the court to assess the need of a party to access, are appropriate to be brought to the court for determination. Rather than simply institutionalizing this current practice, the Proposed Rule, as drafted, creates numerous significant problems. I respectfully urge the Court to decline to adopt these suggestions and refer any areas where the Court perceives some change is appropriate to the Committee for reconsideration.

Pamela L. Hunt. Esq.

SUPPLEMENT TO MINORITY REPORT
CONCERNING PROPOSED AMENDMENTS TO
MASS. R. CRIM. 14

To the Chief Justices and Associate Justices of the Supreme Judicial Court
and members of the Standing Advisory Committee on the Criminal Rules

I have requested that the Minority Report concerning Rule 14, that I prepared in 2001, be supplemented and sent to the Court.

Having only had a few days to review the lengthy report and Committee commentary to be sent to the Court concerning all the proposed amendments, it has not been possible to respond in depth or in detail. Rather than deal with many of the specific provisions discussed in earlier reports concerning Rule 14, I would like to respond to parts of the commentary and address a few basic conceptual difficulties that I and others see in the proposed Rule. I expect to file separately a Minority Report addressing concerns and objections in other proposed Rules being transmitted to the Court.

1. A primary reason the Committee asserts for a radical change to Rule 14 is to bring it into compliance with the requirements of G.L. c. 218, § 26A and Superior Court Standing Order 2-86. Of course, the statute pertains only to practice and cases in the District and Municipal Courts. I suggest that where the legislature made a specific choice that those discovery requirements outlined in the statute should only apply in District and Municipal Courts, this Court should heed the wisdom of understanding the difference between District and Municipal Court cases and Superior Court cases. The very existence of § 26A and its limited applicability provides a strong argument against imposing its provisions in the Superior Court where the cases are more complex. That the Standing Order itself sets forth a very different approach to discovery practice than the Proposed Rule does, and the fact that some of the terms of the Standing Order have been found by judges and practitioners to be impracticable and unworkable, should provide additional reason to reject a plan that would impose the practice under §26A on the Superior Court. The current Rule 14 and §26A have existed together for a period of time with no confusion or difficulty. If the Court deems it appropriate to have Rule 14 to restate the precise requirements of §26A as applicable to District and Municipal Court cases, that may provide an acceptable amendment.

2. There is no principled reason to create a system that requires the prosecution to first provide all discovery, and certify that it has done so, before it can seek discovery from the defense. This proposal seems to derive from the notion that this is constitutionally required, and the Committee's report relies upon *Wardius v. Oregon*, 412 U.S. 470 (1973), and *Williams v. Florida*, 399 U.S. 78 (1970). But neither *Wardius* nor *Williams* concern the timing of discovery, and do not stand for the principle that the prosecution cannot obtain discovery until after it provides discovery. *Wardius* concerned the "constitutional unfairness" of a statute that required a defendant to reveal an alibi

defense, and of excluding alibi evidence that was not revealed, while the state discovery procedure had no requirement for the state to reciprocate with evidence it had to rebut the alibi. The case was about the fact a discovery system that did not have two-way discovery; it had nothing to do with when a defendant could be required to give notice. In *Williams,* which approved procedures that required a defendant to give notice of defense*,* the Supreme Court said that the constitution does not entitle a defendant "to await the end of the state's case before announcing the nature of his defense... ." A system that requires one party to complete discovery before it may seek discovery from the other party, seems to set the discovery process up as an adversarial event, one that would foster strategy and posturing, rather than one that would seek the sharing of information.

3. The definition of "witness statement" in current Rule 14 should be retained. At the very least, the change may create confusion in the interplay between defining what is a witness statement and what would be covered under the work product protection of the Rule. The recent case of *Commonwealth v. Liang*, 434 Mass. 131 (2001), was decided in light of the current definition of witness statement in terms of information provided by witnesses to victim-witness advocates or other members of the prosecution team.

4. The Committee report seems to misapprehend concerns about expanding the prosecutor's duty about information it does not have but of which it becomes aware.

The Proposed Rule would seek to make a substantial change in current discovery obligations concerning information obtained from persons who are not under the direction and control of the prosecutor on the particular case. This most often will mean victims and witnesses. The proposal would require the prosecutor to inform defense counsel about matters the prosecutor learns while working with the victim or witness. Of course any exculpatory information obtained would be disclosed. But most often the information will not be exculpatory; but merely information the prosecutor may be told about.

An example that was given to me is as follows: In the course of working with an eleven year old rape victim, the girl discloses that she has kept a diary of her feelings about the assault. Or a rape victim tells the prosecutor that he/she has sought rape crisis or other counseling and will be able to follow through and testify at trial. There is nothing in that information that is exculpatory. Under the proposal, however, it would have to be disclosed to defense counsel. This puts the prosecutor in a terribly awkward position with the witness or victim who could easily perceive the fact the prosecutor told the defense attorney about the diary or about the counseling as a breach of trust. The proposed rule, however, should not put the prosecutor in the middle. The Court has recognized the vital importance of prosecutor's establishing good relationships with victims and witnesses. *Commonwealth v. Beal*, 429 Mass. 530, 532-533 (1999).

The other problem with this provision is that it does not make completely clear where the line between information covered here (information that is not exculpatory) and the work product of the prosecutor and his or her team is to be drawn. Much of what seems to be covered by the new duty to disclose would be covered by work

product protection provisions as well.

Defense counsel might well believe such information to be relevant and would want to move, through proper motion, to seek it. The provisions of Rule 14 on how this would happen in practice are less than clear. I suggest that any discussion about discovery from third persons, be postponed until Rule 17 is addressed by the Committee.

Thank you for the opportunity to comment.

Respectfully,

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